92-1940

No. 93-_____

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ANTHONY S. MONTELEONE &
MARY ANN CUMMINS-MONTELEONE

Petitioners,

No. 91-16804
No. 91-16725
9th Cir Ct.
of Appeals

v.

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SOLANO NORTHERN
SOLANO JUDICIAL DISTRICT,
et al.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

ANTHONY S. MONTELEONE
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Petitioners, in their proper persons.

45 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Petitioners' appeal from The United States District Court of California, Eastern District, denying their request for release from custody and reversal of their convictions become moot after their release from custody; or, would the fact that collateral consequences attached to their convictions warrant a determination on the merits of their appeal, thus preserving a live case or controversy?

2. Did the Court of Appeals abuse its discretion in dismissing the Appeal as moot without requesting or allowing the parties to address the issue of "mootness?"1/

1/ The style of this case as shown on the front cover of this Petition contains the name of all parties to this cause. This case initially included Albert M. Cardoza, Sheriff of Solano County as a party. However, since their release from incarceration petitioners can no longer seek relief from their confinement by Sheriff Cardoza. The Circuit Court of Appeals consolidated petitioners' appeals.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Anthony S. Monteleone and Mary Ann Cummins-Monteleone (herein Monteleones), hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.2/

OPINIONS BELOW

The Court of Appeals' decision dismissing the Monteleones' appeals as moot for lack of "in custody jurisdiction" from the United States District Court denying their Petition for a Writ of Habeas Corpus was entered on December 8, 1992, and was not a published decision; See Monteleone v. Municipal Court of California; County of Solano Northern Solano Judicial District,

2/ Petitioners' cases were consolidated by the Court of Appeals.

et al., _____ F. 2nd _____ (9th Cir. Nos. 91-16725, 91-16804). Petition for rehearing was timely filed, but was denied March 4, 1993. The unpublished opinion of the Court of Appeals appears in Appendix A of this Petition. The Final Order of the United States District Court for the Eastern District of California appears in Appendix B of this Petition.

JURISDICTION

The opinion and judgment sought to be reviewed by this petition was entered in the United States Court of Appeals for the Ninth Circuit on December 8, 1992. The jurisdiction of this Court regarding this petition is established pursuant to Title 28, U.S. Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

UNITED STATES CONSTITUTION

Article III, Section 2, states in pertinent part:

> The judicial power shall extend to all Cases, . . . [and] Controversies . . . .

STATUTES

Title 28, U. S. Code Section 2254 states in pertinent part:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . .

Title 28, U.S. Code Section 2253 states in pertinent part that:

> In a habeas corpus proceeding before a circuit or district court judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

The Federal Rules of Appellate Procedure, Rule 22(b) states in pertinent part that:

> If an appeal is taken by the applicant, the district judge who rendered the judgment shall . . . issue a certificate of probable cause . . .

STATEMENT OF THE CASE

On September 20, 1989 Monteleones were convicted of three counts of allegedly violating California Revenue and Taxation Code, Section 19401, failing to file a tax return, a misdemeanor, and an additional three counts of allegedly violating Revenue and Taxation Code Section 19406, willful failure to file a tax return with the intent to evade payment of a tax, a felony prosecuted as a misdemeanor by virtue of California Penal Code Section 17(b)(4).

Subsequently, the Monteleones were sentenced, and on October 27, 1990, after exhaustion of state appellate remedies, they were incarcerated. On November 21, 1990 both petitioners filed a Petition for a Writ of Habeas Corpus with the United States District Court, Eastern District of California. On October 15, 1991 the United States District Court denied and dismissed

the Appellants' respective Petitions.

On October 24, 1991 Appellants filed timely notices of appeal; and, on November 4, 1991 the District Court, Honorable Lawrence K. Karlton, granted a certificate of probable cause on Monteleones' appeals.

Anthony S. Monteleone was released from custody on October 17, 1991; and, Mary Ann Cummins-Monteleone was released from custody on November 26, 1991. All the briefs on appeal to Circuit Court of Appeals were timely filed. The briefs by all the parties addressed only the merits of the appeal. In the relief requested on appeal, the Monteleones were seeking reversal of their illegal conviction, inter alia.

On December 8, 1992, a three judge panel consisting of the Honorable Mary M. Schroeder, Honorable Betty M. Fletcher and the Honorable John T. Noonan dismissed

Monteleones' appeal on the grounds that they were moot since the Monteleones were no longer in custody and did not demonstrate they faced future custody -- therefore the Court had no jurisdiction to consider the appeals.

The issue of mootness was raised by the court panel, and not by the parties to the appeals. The Court did not request that any party brief the Court as to whether or why, the appeals had gone moot.3/

On request for rehearing, Monteleones argued that in-custody jurisdiction had been satisfied as they were in custody when the Petition for a Writ of Habeas Corpus

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3/ The Monteleones are not seeking review of the merits of their appeal. Rather they are seeking only to determine whether the Circuit Court of Appeals had statutory and constitutional jurisdiction to consider the appeal from the habeas corpus proceedings in the district court. The judicial review is about process and jurisdiction.

was filed with the United States District Court. Carafas v. LaVallee, 391 U.S. 234, 20 L.Ed.2d 554, 88 S.Ct. 1556 (1968); Sibron v. New York, 392 U.S. 40 (1968); Cox v. McCarthy, 829 F.2d 800 (9th Cir. 1987).

Monteleones also argued that the only questions which the Appeals Court could consider when deciding if the appeal was moot, were: (i) did sufficient adverse collateral consequences attach to their convictions, which would establish live case or controversy jurisdiction for appellate review, and; (ii) were the Monteleones seeking relief, other than release from their illegal confinement, which the Court could grant, such as reversal of an illegally obtained conviction, thereby not mooting the appeal. Cox v. McCarthy, 829 F.2d 800 (9th Cir. 1987)

Finally, Monteleones contended that the Court of Appeals should have not summarily dismissed their appeals as being moot, without first presenting this question to parties for briefing thereon. Lane v. Williams, 455 U.S. 624, 71 L.Ed.2d 508, 102 S.Ct. 1322, (1982); Lane v. Williams, 594 F.2d 614 (7th Cir. 1979); Cox v. McCarthy, 829 F.2d 800 (9th Cir. 1987).

REASONS FOR GRANTING THE WRIT

The Court of Appeals For the Ninth Circuit summarily dismissed Monteleones' appeals on the grounds that since they were not currently incarcerated, and did not face future incarceration, that their appeals had become moot, as there was no in-custody jurisdiction. However, Monteleones had established in-custody jurisdiction because they were incarcerated on the date which their Petitions For a Writ of Habeas Corpus were filed in the

United States District Court. Thus, the only remaining question before the Court of Appeals was whether or not a live case or controversy existed on which the Court could grant actual relief. The element which serves to determine whether a live case or controversy exists, is whether sufficient adverse collateral consequences attached to Monteleones' convictions, to warrant consideration of the merits of the appeal, and reversal of the conviction.

Monteleones were not simply seeking release from custody. They were also seeking reversal of their illegally obtained convictions. It is the practice not only of the Circuit Courts of Appeals, but as well, the practice of this Honorable Court, to seek supplemental briefing from the parties to a habeas corpus appeal, when the question of mootness is raised by the Court, sua sponte.

Because the panel for the Court of Appeals departed from well settled decisional law when determining whether a habeas corpus appeal has become moot, as well as departing from the accepted procedure of requesting additional briefing from the parties before declaring an appeal to be moot, this petition should be granted.

IN CUSTODY JURISDICTION

For an appellate court to have jurisdiction to hear an appeal from a denial of a Petition for a Writ of Habeas Corpus, the petitioner must be in custody when the petition is filed in the district court. Jurisdiction is not defeated by the unconditional release of the petitioner prior to the completion of the proceedings. Carafas v. LaVallee, 391 U.S. 234, 20 L.Ed.2d 554, 88 S.Ct. 1556 (1968); Sibron v. New York, 392 U.S. 40 (1968). Therefore,

the appeals court is not deprived of jurisdiction to hear the appeal by way of lack of in-custody jurisdiction. Cox v. McCarthy, 829 F.2d 800 (9th Cir. 1987)

Habeas Corpus relief contemplates remedies other than solely release from custody. Reversal of a conviction is that type of relief. Walker v. Wainwright, 390 U.S. 335 19 L.Ed. 2d 1215, 88 S.Ct. 962 (1968); cf. Lane v. Williams, 455 U.S. 624, 71 L.Ed.2d 508, 102 S.Ct. 1322, (1982) and its progenies which hold that failure to attack the conviction and the adverse collateral consequences or the underlying conduct of parole violation is fatal to the granting of habeas relief. Additionally, the imposition of fines or penalties only, without an attachment of present or future incarceration is insufficient to invoke habeas relief; and threat of imprisonment for failure to pay a fine does not convey

subject matter jurisdiction for habeas relief. However, under certain circumstances there is an exception to this tenet.

The only question which remains once a petitioner is released from custody, is, "does he have a sufficient stake in his conviction, due to the adverse collateral consequences thereof, which would give the court jurisdiction to entertain and pass on the merits of the appeal?"

THE COLLATERAL CONSEQUENCES OF MONTELEONES' CONVICTIONS GIVES THE COURT OF APPEALS JURISDICTION TO HEAR THE MERITS OF MONTELEONES' APPEALS

Monteleones, throughout these entire proceedings have been classified by the government as "illegal tax protesters." Given today's climate about paying one's "fair share" of taxes, to lessen the burden on all others, the charges leveled against Monteleones and the convictions thereof, are no small matter. Robbins v.

Christianson, 904 F.2d 492 (9th Cir. 1990).

Moreover, Monteleones were charged with felony offenses, prosecuted as misdemeanors. The illegal convictions on these charges carry the additional stigma of tax evasion, as opposed to just simple failure to file a tax return; even though the conviction only made misdemeanants of the Monteleones, rather than felons. Nevertheless, the adverse collateral consequences which attach to this conviction will follow the Monteleones forever, and therefore the appeal was not moot. United States v. Morgan, 346 U.S. 502, 98 L.Ed. 248, 74 S.Ct. 247, (1954); Zal v. Steppe, 92 C.D.O.S. 5877; Robbins v. Christianson, supra.

Adverse collateral consequences can be either statutory or non-statutory in nature. Lane v. Williams, supra. For example, the conviction can be used for

sentence enhancement purposes, both on the state and federal level. It could be used to impeach persons credibility as witnesses in other cases, whether it be other future prosecutions, or where they may testify in someone else's behalf in a case. United States v. Maldonado, 735 F.2d 809 (5th Cir. 1984); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987). The convictions could also serve to act as a bail enhancement tool if the Monteleones are charged by the state or federal authorities, with similar or unrelated charges.

Particularly in the case of Mary Ann Cummins-Monteleone her conviction has been used to terminate her from her job as air traffic assistant with the FAA, as well as keeping her from being re-instated. Many state, federal, local and private employment forms require disclosure by the

applicant of any convictions or sentences served by the applicant. (For example see Federal SF Form 171). And, it has been held that to deny someone unemployment because of past convictions is not discrimination. Therefore, the Monteleones have no remedy available to them to challenge this type of adverse collateral consequence of the conviction, if their appeal is deemed moot simply because they are not in custody and do not face future custody. Robbins v. Christianson, supra.

The collateral consequences of a conviction are presumed to exist, notwithstanding the fact that the conviction is one for a misdemeanor offense. Hirabayashi v. United States, supra; Chavez v. United States, 447 F.2d 1373 (9th Cir., 1971); Byrnes v. United States, 408 F.2d 599 (9th Cir. 1969); United States v. Walgren, 885 F.2d

1417 (9th Cir. 1989). The sooner the issues are litigated, the better, rather than require a citizen to suffer the possibility of adverse collateral consequences for an indefinite period of time. Peyton v. Rowe, 391 U.S. 54 (1968); Pollard v. United States, 352 U.S. 354, 1 L.Ed. 2d 393, 77 S.Ct. 481.

In Cox v. McCarthy, supra, the Ninth Circuit Court of Appeals distinguished between statutory jurisdiction to hear a habeas petition and constitutional jurisdiction, i.e., live case or controversy. The Court found that release from custody did not prevent statutory jurisdiction; and, that a challenge to the convictions, as opposed to only the sentence, preserves the live case or controversy jurisdiction, if adverse collateral consequences attach to the conviction. On appeal the Monteleones were

challenging the conviction, as well as the legality of their sentence and incarceration. In fact, the first prayer for relief requested from the Court of Appeals was to reverse their convictions. This was sufficient to overcome the mootness issue.4/

While the Court of Appeals no longer possessed the power to release the Monteleones from their illegal confinement, it did possess the power to reverse their illegal convictions, removing the adverse collateral consequences attached thereto.

The Court panel which considered Monteleones' appeals relied on Dremann v. Francis, 828 F.2d 6 (9th Cir. 1987) (per curiam) and United States v. Michaud, 901 F.2d 5, (1st Cir. 1990) (per curiam) in holding that the Court had lost jurisdiction. However, neither of those

4/ Id. 829 F.2d at 803; Lane v. Williams, supra, 455 U.S. at 631, fn. 11.

cases are dispositive of the Monteleones' appeals, nor do they even remotely address in-custody jurisdiction, as set forth in the panel's decision.

Nonetheless, the panel did note that the only remaining consequence of the conviction, was payment of a $60,000 fine -- although they gave no consideration to other adverse collateral consequences which attached to the convictions. Monteleones will distinguish those two cases, upon which the panel relied.

In Dremann v. Francis, supra the case involved an attorney who had been held in contempt. The sentence imposed was wholly monetary in nature with no sentence of imprisonment attaching to the original sentence. Upon a hearing, it was found that the attorney "willfully" refused to pay the fine, and was thus given the opportunity to pay, or spend three days in

jail.

The Ninth Circuit Court of Appeals held that the potential of incarceration which attached to the willful failure to pay did not constitute a deprivation of liberty, no conditions of restraint were placed on the petitioner as a result of the sentence, and lastly, the petitioner had control over whether he went to jail or not, as he could pay the fine, or spend his time in jail. It is noted that the petitioner did not allege he could not pay the fine. He merely refused to pay.

If it was the panel's opinion, in the Monteleones' appeals, that no jail sentence attached to Monteleones' initial sentence, they seriously mis-interpreted the facts. In any event, Dremman v. Francis, supra does not address any adverse collateral consequences Monteleones face as a result of their convictions. Simply, the facts of

the Dremman court are not apposite with the facts in Monteleones' habeas corpus proceedings and appeals. Therefore, the principals of law expressed therein are not applicable to the Monteleones' appeals.

The panel next relied upon United States v. Michaud, supra. This case, while more on point to Monteleones' appeals, is still lacking in merit for purposes of dismissing the appeals, as moot. In Michaud, there is a major distinguishable factor, with, apparently a remedy which may still have been available, which may have provided Michaud with relief.

The major factor which is distinguishable in this case is that Michaud could not, and did not establish in-custody jurisdiction when he filed his petition with the district court. This holding was dispositive of the entire case.

Of course, this is completely contrary to the Monteleones' appeals as they were, as a matter of law and fact, in custody when they filed their petition in the district court.

In any event, both cases turned on two facts; whether there was in-custody jurisdiction at the time of the filing of the original petition, and whether a monetary fine, without the attachment of present or future in-custody jurisdiction, was sufficient to invoke habeas jurisdiction and review.

What is note-worthy at this point, is the fact, that in its opinion, The Ninth Circuit Court of Appeals did not reverse itself and find that the presumption of adverse collateral consequences does not exist in this circuit any longer. It merely found that adverse collateral consequences, in the form of monetary

penalties, in the absence of in-custody jurisdiction, was insufficient for purposes of habeas review.

LIVE CASE OR CONTROVERSY

A court's jurisdiction is limited under Article III of the United States to live cases or controversies. "[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'" Preiser v. Newkirk, 422 U.S. 395, 45 L.Ed. 2d 272, 95 S.Ct. 2330, (1975); North Carolina v. Rice, 404 U.S. 244, 246, 30 L.Ed. 2d 413, 92 S.Ct. 402 (1971). In Preiser, this Court had before it the question as to whether a suit seeking declaratory relief for the alleged illegal transfer of Newkirk, a prisoner, was moot since Newkirk, during the pendency of the litigation, had been transferred from a

maximum security institution, back to a medium security institution. In granting the petition for certiorari, this Court instructed briefing to be limited to the question of mootness.5/

It was found that the case was moot since the relief Newkirk was seeking had already been obtained and there was "'no reasonable expectation that the wrong will be repeated.'"6/ The Court also held that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."7/

Monteleones contend that they had a live case or controversy at all stages, including the appellate stage from the

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5/ 419 U.S. 894, 42 L.Ed. 2d 138, 95 S.Ct. 172 (1974).
6/ United States v. W.T. Grant Co., 345 U.S. 629, 97 L.Ed. 1303, 73 S.Ct. 894; United States v. Aluminum Co. of America, 148 F.2d 416, 448 (CA2 1945); id., at 422 U.S. 402.
7/ id., at 422 U.S. 401, cites omitted.

habeas corpus proceeding, in that they were seeking reversal of their convictions based on an illegally obtained conviction, not mere release from their illegal custody. The Court of Appeals was not being requested to solely render an advisory opinion as to the illegality of Monteleones' imprisonment. Rather, they were being asked to reverse Monteleones' convictions as being illegally obtained. Clearly, this is relief which could have been granted. Church of Scientology of California v. United States and Frank S. Zolin, ____ U.S. ____, ____ L.Ed. 2nd ____, ____ S.Ct. _____, 91-946, (1992).

In Church of Scientology of California v. United States and Frank S. Zolin, this Court reversed the Ninth Circuit, which held that the appeals had become moot since the Internal Revenue Service had already succeeded in enforcing their administrative

summons, reasoning that since a decision from the court could not alter the fact that the records had already been produced no effective relief could be granted. In reversing, this Court held that the records, even though produced could be ordered returned, along with any copies made thereof, if the summons had been improperly issued, concluding that the appeal was therefore, not moot. In short, if any type of relief can be granted which affects the substantive rights of the parties involved, a justiciable controversy exists, and the appeal is not moot.

THE COURT PANEL ABUSED ITS DISCRETION BY NOT INQUIRING OF THE PARTIES SUPPLEMENTAL BRIEFING ON THE ISSUE OF MOOTNESS PRIOR TO DISMISSING THE APPEAL

On its own initiative the Court panel determined that the appeals had gone moot, apparently because of the lack of in-custody jurisdiction. However, as previously briefed, that was an erroneous

standard which did not warrant dismissal. This left the only other ground for dismissal as being Monteleones' failure to attack the conviction and the adverse collateral consequences thereof. In the Ninth Circuit the presumption is enjoyed by Appellants that adverse collateral circumstances always attend a conviction. And, as previously briefed, the Monteleones are seeking reversal of their conviction.

If the Court Panel had any doubt as to whether these appeals had gone moot, the panel should have followed past Court practice and requested briefing from the parties as to the mootness issue -- as none of the parties on appeal, advanced this issue. In Cox v. McCarthy, supra, the Ninth Circuit was entertaining a habeas appeal. Upon review, the question of mootness arose in the Court. However, the Court did not dismiss the appeal, rather it

requested additional briefing from the parties on the issue of mootness. After receipt of the supplemental briefs the Court than, reluctantly found the appeal to be moot.

In Naylor v. Sup. Ct. of State of Arizona, 558 F.2d 1363 (1977), another habeas appeal, the issue of mootness was again raised by the Court, as opposed to the parties. Again, rather than dismissing the appeal, the Court requested that the parties file supplemental briefs addressing the issue of mootness. Upon the submission of the briefs the Court found that because of the absence of any adverse collateral consequences attendant to the conviction there was no live case of controversy, despite the fact that the petition for the writ had been filed while the petitioner was still in custody, satisfying the in-custody jurisdictional requirement.

Thus, it is the accepted practice of the Ninth Circuit Court of Appeals to inquire of the parties on appeal, when the Court raises the issue of mootness. Not only is it the practice of the Ninth Circuit to request supplemental briefing, it is also the accepted practice of other circuits and acknowledged by this Court. See Lane v. Williams, 455 U.S. 624, 71 L.Ed.2d 508, 102 S.Ct. 1322, (1982); Lane v. Williams, 594 F.2d 614 (7th Cir. 1979); Preiser v. Newkirk, 422 U.S. 395, 45 L.Ed. 2d 272, 95 S.Ct. 2330, (1975).

By deciding, without knowing, that the appeal was moot, the Court panel effectively denied Monteleones appellate review of issues which were certified by the district court as meritorious for further review; denying Monteleones due process and equal protection under the laws. This serious departure from proper

standards of criminal law administration requires corrective action. McNabb v. United States, 318 U.S. 332, 87 L.Ed. 819, 63 S.Ct. 608.

CONCLUSION

For the reasons set forth hereinabove, a Writ of Certiorari should issue to review the judgment of the Ninth Circuit Court of Appeals; or, in the alternative, this Court should issue an order to the Ninth Circuit to re-instate Monteleones' appeals for additional briefing on the issue of mootness.

Respectfully Submitted,

Dated: JUNE 1st, 1993

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APPENDIX A

NOT FOR PUBLICATION

FILED
DEC 8, 1992
CATHY A. CATTERSON,
U.S. CT. OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY ANN CUMMINS MONTELEONE, Petitioner-Appellant, v. MUNICIPAL COURT CA.; COUNTY OF SOLANO NORTHERN SOLANO JUDICIAL DISTRICT, et al., Respondents-Appellees.	No. 91-16725 D.C. No. CV-90-01448-LKK
ANTHONY S. MONTELEONE, Petitioner-Appellant, v. MUNICIPAL COURT CA,; COUNTY OF SOLANO NORTHERN SOLANO JUDICIAL DISTRICT, et al., Respondents-Appellees.	No.91-16804* D.C. No. CV-90-01447-LKK MEMORANDUM**

Appeal from the United States District Court for the Eastern District of California Lawrence K. Karlton, District Judge, Presiding

Submitted November 23, 1992***

Before: SCHROEDER, FLETCHER and NOONAN, Circuit Judges.

* We consolidate these cases on our own motion.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Mary Ann Cummins-Monteleone and Anthony S. Monteleone appeal the district court's denial of their 28 U.S.C. Sec. 2254 habeas petitions. they have both been released from custody since the district court denied their petitions, and have only to pay a $60,000 fine to complete their sentences. Because they are not presently in custody and have not demonstrated that they face future custody, this court lacks jurisdiction to consider their appeals. See Rule 2, Rules Governing Section 2254 Cases, 28 - U.S.C. foll. Sec. 2254; Dremann v. Francis, 828 F.2d 6, 7 (9th Cir. 1987)

(per curiam); see also United States v. Michaud, 901 F.2d 5, 7 (1st Cir. 1990) (per curiam). Therefore, we dismiss their appeals as moot.

DISMISSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

FILED
OCT 15, 1991
CLERK, US DIST. CT., E. DIST. OF CALIFORNIA
BY _____
Wagner, Jack L
DEPUTY CLERK

ANTHONY S. MONTELEONE,

Petitioner,

No. CIV S-90-1447 LKK GGH P

vs.

CLOSED
DATE:OCT 15, 1991

MUNICIPAL COURT OF CALIFORNIA, et al.,

Respondents.

ORDER

Petitioner, a state prisoner proceeding, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. Sec. 2254. The matter was referred to a United States Magistrate Judge prusuant to 28 U.S.C. Sec. 636(b)(1)(B) and Local General Order No. 262.

On August 30, 1991 the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that

any objections to the findings and recommendations were to be filed within thirty (30) days. On September 25, 1991, petitioner filed timely objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. Sec. 636(b)(1)(C) and Local Rule 305, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations filed August 30, 1991, are adopted in full; and

2. The petition for habeas corpus is denied.

DATED: October 11, 1991.

Karlton, Lawrence K.
UNITED STATES DISTRICT JUDGE

/ls:ji

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

FILED
OCT 15, 1991
CLERK, US DIST. CT., E. DIST. OF CALIFORNIA
BY _____
Wagner, Jack L
DEPUTY CLERK

MARY ANN CUMMINS-MONTELEONE,

Petitioner,

No. CIV S-90-1448 LKK GGH P

vs.

CLOSED
DATE:OCT 15, 1991

MUNICIPAL COURT OF CALIFORNIA, et al.,

Respondents.

ORDER

/

Petitioner, a state prisoner proceeding, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. Sec. 2254. The matter was referred to a United States Magistrate Judge prusuant to 28 U.S.C. Sec. 636(b)(1)(B) and Local General Order No. 262.

On August 29, 1991 the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that

any objections to the findings and recommendations were to be filed within thirty (30) days. On September 25, 1991, petitioner filed timely objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. Sec. 636(b)(1)(C) and Local Rule 305, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations filed August 29, 1991, are adopted in full; and

2. The petition for habeas corpus is denied.

DATED: October 11, 1991.

Karlton, Lawrence K.
UNITED STATES DISTRICT JUDGE

/ls:ji

No. 92-1940

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ANTHONY S. MONTELEONE, et al.
Petitioner,

v.

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SOLANO JUDICIAL DIST., et al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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35 pp

ISSUE PRESENTED

Whether the court can dismiss a habeas petition as moot where petitioners served substantial jail time by rejecting probation and did not demonstrate collateral consequences from their misdemeanor convictions for failure to file tax returns?

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No. 92-1940

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ANTHONY S. MONTELEONE and
MARY ANN CUMMINS-MONTELEONE
Petitioners,

v.

MUNICIPAL COURT OF CALIFORNIA, COUNTY OF SOLANO
NORTHERN SOLANO JUDICIAL DISTRICT, et al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioners seek review of an unpublished Ninth Circuit Court of Appeals Memorandum filed on December 8, 1992, which dismissed for mootness their consolidated appeals from a district court's denial of their 28 U.S.C. section 2254 habeas petitions. App. A, Consolidated cases: *Mary Ann Cummins Monteleone v. Municipal Court, et.al.*, Case No. 91-16725, D.C. No. CV-90-01448-LKK;

Anthony S. Monteleone v.Municipal Court, et. al., Case No. 91-16804, D.C. No. CV-90-01447-LKK.

The United States District Court for the Eastern District of California had denied petitioners' separate habeas petitions on the merits in unpublished opinions on October 15, 1991, after adopting extensive findings by the U.S. Magistrate filed on August 29, 1991, and August 30, 1991. App. B.

Petitioners' jury convictions stemming from state tax code violations previously had been affirmed on August 20, 1990, in unpublished written opinions by the State of California, Solano County Appellate Department, which found that petitioners had "attempted to abuse the judicial system," that the "record does not reveal any error of law," and that the trial judge gave petitioners "the opportunity to mitigate [their] punishment, but [they] failed to do so." App. C *People v. Mary Ann Cummins-Monteleone*, No. FC28088; *People v. Anthony Monteleone*, No. FC28087.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C § 1254(1).

On March 4, 1993, the Ninth Circuit Court of Appeals denied petitioners' petitions for rehearing and "suggestion for rehearing en banc" of the Court's December 8, 1992, Memorandum.

Whether the case is moot following petitioners' release from custody is at issue in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners rely upon the following Statutes and Rules: Title 28, U.S. Code Sections 2253 and 2254; Federal Rules of Appellate Procedure, Rule 22(b).

Respondent also relies upon the following federal executive and administrative agency orders and California statutes: (1) United States Office of Government Ethics *Standards of Ethical Conduct For Employees of the Executive Branch,* Part I, Executive Order 12674 and 5 C.F.R. Part 2635 (August 1992). App. F; (2) Department of Transportation Federal Aviation Administration's *Conduct and Discipline* manual, Chapter 3. App. F; (3) Cal.Rev. & Tax Code, §§ 19401, 19406. App. E.

STATEMENT OF THE CASE AND OF FACTS

On October 19, 1988, the Solano County District Attorney filed complaint number F84281CR and F84282CR charging petitioners Mary Ann Cummins-Monteleone (M. Monteleone) and Anthony S. Monteleone (A. Monteleone), (collectively, "petitioners") with six misdemeanor counts as follows: (1) Willful and unlawful failure to file an income tax return from 1985-1987. (Count I-III, Cal. Rev. & Tax Code, § 19406); (2) Failure to file an income tax return and supply information required by the Revenue and Taxation Code from 1985-1987. (Count IV-VI, Cal. Rev. & Tax Code, § 19401(a)). *See, CR 18-24, Respondent's Appendix of Exhibits in Support of Answer in Opposition to Petitions for Writ of Habeas*

orpus, at Exhs. 1 and 2.[1/]

On or about March 14, 1989, petitioners received from the court, a copy of the complaint. Exh. 1 and 2. Petitioner, A. Monteleone, initially appeared for arraignment on April 6, 1989, at which time he was advised as to the charges pending against him. Exh. 1, p. 1; Exh.3, RT 4/6/89, p. 1. Petitioner represented that he had money to hire his own attorney and requested a continuance to seek counsel. Exh. 1, p. 1; Exh. 3, RT 4/6/89, p. 1.

Between April 6, 1989, on August 14, 1989, the court granted petitioner numerous continuances for the express purpose of retaining counsel upon petitioner's assurances that he had sufficient funds for this purpose. Exh. 1; Exh. 3. Specifically, the record reflects that the court granted petitioner continuances on the following dates: (1) April 6, 1989; (2) May 11, 1989; (3) June 1, 1989; (4) June 21, 1989; and (5) July 24, 1989. Exh. 1; Exh. 3, RT 4/6/89, pp. 1-2; RT 5/11/89, p. 1; RT 6/1/89, p. 1; RT 6/21/89, p. 1.

On August 14, 1989, A. Monteleone appeared without counsel for the sixth consecutive time since April 6, 1989. Exh. 1; Exh. 3. Over petitioner A. Monteleone's objection, the court entered not guilty pleas to the charges in the complaint. Exh. 1, p. 2.

Similarly, the court continued the M. Monteleone case seven times for counsel and plea. Exh. 2; Exh. 3,

---

1. Unless otherwise noted, all references are to exhibits which are found in Respondents' Appendix to Answers, Exhs.1-11 listed in the Court of Appeals docket sheet as CR 18-21 in the A. Monteleone case and CR 21-24 in the M. Monteleone case.

RT 8/29/89, pp. 11-18; Exh. 3, RT 4/4/89, p. 1.

On August 29, 1989, petitioner M. Monteleone, appeared again in court without counsel. Exh. 2; Exh. 3, RT 8/29/89, pp. 11-18; Exh. 3, RT 9/20/89 p. 31.

The court then entered a plea of not guilty on petitioner M. Monteleone's behalf. Exh. 3, RT 8/29/89, p. 14.

The court set trial for September 19, 1989, with petitioner's "co-defendant [A. Monteleone], who's also been engaged in the same type of conduct, attempting to delay the process of the Court." Exh. 3, RT 8/29/89, p. 14.

On September 19, 1989, petitioners appeared in court without counsel. Exh. 1, p. 4; Exh. 3, RT 9/19/89, pp. 1, 4. The court, Judge Udall was disqualified pursuant petitioners' California Penal Code section 170.6 motion. Exh. 3, RT 9/19/89, p. 3.

The trial commenced on September 20, 1989. Exh. 3, RT 9/20/89 p. 39. Petitioners were given a copy of the jury instructions, but refused to look at them. Exh. 3, RT 9/20/89 (In Chambers) pp. 1-7.

Neither petitioner M. Monteleone nor Petitioner A. Monteleone were represented by counsel at trial. Exh. 1, pp. 4-6; Exh. 2, pp. 5-7.

Prior to trial, the court denied petitioner M. Monteleone's motion to continue the trial, finding that petitioner "had adequate time to obtain counsel and prepare for trial." CR 21-24, Exh. 2, p. 5.

Petitioner A. Monteleone had refused to "sign [the] financial declaration [to obtain appointed counsel] under penalty of perjury." Exh. 1, p. 4. Accordingly, the court would "not appoint counsel." Exh. 1, p. 4; Exh. 3, RT

9/20/89, pp. 6-23.

In response to petitioner's request for appointment of counsel and for a continuance, the court stated as follows:

> "The matters were both put over seven times for you to hire attorneys. . . . It's obvious to the Court that what you were doing was, basically, delaying the Court process by indicating you were mailing letters to attorneys. But in any event, it was the Court's feeling you did not intend to retain counsel; obvious you were doing nothing more than dealing with dilatory obstruction of process to delay this matter in court. I put this matter over for jury trial during the last court appearance. You've had until today to retain counsel." Exh. 3, RT 9/20/89 p. 3.

Prior to trial, the court also denied petitioners' *Marsden* motion on the ground he could not "discharge an attorney you don't have." Exh. 3, RT 9/20/89 p. 36. The court observed, "Maybe that was . . .the next step after you hired a lawyer. Maybe you filed that prematurely." Exh. 3, RT 9/20/89 p. 36.

On September 20, 1989, a jury found petitioners guilty on all counts alleged in the complaint. Exh. 1, pp. 5-6; CR 21-24, Exh. 2, p. 7.

At trial, Petitioner M. Monteleone professed to have such knowledge of the judicial system that she could tell the court what the district attorney was required to file, but also professed to have no understanding of the proceedings against her. CR 21-24. Exh. 3, RT 9/20/89

pp. 24-25, passim.

Evidence at trial and the related hearings showed that petitioner A. Monteleone had recently retired from the military and was previously employed at Mare Island. Exh. 3; Exh. 3, RT 10/27/89 p. 70. Petitioner M. Monteleone was employed with the F.A.A. as an Air Traffic assistant. Petitioner M. Monteleone was a member of "The Free Enterprise Society in Fresno," and petitioners had not filed a tax return since 1982. Exh. 3, RT 10/27/89 p. 71, RT 8/29/89, pp. 11-18, RT 9/20/89 p. 31.

After trial, petitioners appeared without counsel for sentencing. Exh. 3, RT 9/20/89 p. 43. The district attorney requested that petitioners receive the "maximum time" for their offenses. Exh. 3, RT 9/20/89 p. 43. The court informed petitioners that it was "willing [to] . . . put the sentencing matter over so [they could] file [their] income tax returns." Exh. 3, RT 9/20/89 p. 45.

On October 3, 1989, petitioners appeared in court for sentencing without counsel. Exh. 3, RT 10/03/89 pp. 52-58. Petitioners, again, requested additional time, and waived time for sentencing. Exh. 3, RT 10/03/89 pp. 55-56.

Petitioner M. Monteleone said she had money only to pay her attorney to handle the "new trial." Exh. 3, RT 10/03/89 pp. 54-55. Petitioner said her attorney, Mr. Fallman would be available on October 27, 1989, and the court continued the case to that date. Exh. 3, RT 10/03/89 p. 58.

On October 27, 1989, petitioners appeared in court for sentencing without counsel representing them directly. Exh. 3, RT 10/27/89 p. 59. Petitioner M. Monteleone told

the court that her attorney, Mr. Fallman was "in the courtroom today," and would be retained if the court granted a new trial. Exh. 3, RT 10/27/89 p. 59.

The court noted for the record, all of the reasons that it would not grant the motion for a new trial, citing again, petitioners' dilatory tactics. Exh. 3, RT 10/27/89 pp. 60-67.

On October 27, 1989, prior to sentencing, the court addressed petitioners and observed as follows.

"[¶] The Court: All right. Appears there's no legal cause why judgment and sentence should not be imposed. . . . [¶] I'll suspend imposition of judgment and sentence. I'll place you on probation for a three-year period under the supervision of the Solano County Probation Department. It will be formal probation. [¶] As I indicated to you before, I don't understand. Normally, the people I get in here on tax-protest type cases are those people where they're either undereducated or don't understand the system. Both of you appear to be quite intelligent. [¶] I don't know what caused you to buy into this idea you think you're going to be able to get out without paying taxes like everybody else does. [¶] Most of the people I have here on tax cases like this do not work for the government. [¶] I mean, Mrs. Monteleone, you work for the FAA, I think you said, as an Assistant Air Traffic Controller; so, all your income comes from the government. . . . Mr. Monteleone is retired military, so, his whole -- his money comes directly from the government, all comes from the taxpayers. [¶] He was previously employed at Mare Island, all tax money. You've been on the public dole for as long as I

can see. [¶] So, I've never had those kind of people. People who protest taxes don't normally work for the government . . . All your income is derived through public monies. . . . I mean, we all would have a lot more money if we didn't pay our taxes. That's the bottom line. [¶] You have not filed a return since 1982, it appears. I think the taxes you owed were $180,000. I can't recall the exact amount. [¶] You've never been underemployed or underprivileged, it looks to me, and you've had good incomes, just failed to pay your taxes, and it seems like the Franchise Tax Board has been very patient with you. [¶] I can't believe, since 1982, it just gets to trial in 1989. They've given you ample opportunity, contacted you by person and by mail, and you continue to assert these ridiculous constitutional arguments that no Court in the land has ever accepted, and will never accept, I assure you. [¶] Any lawyer will probably tell you that who you discussed the matter with. [¶] The Federal Courts have been coming down on tax protesters. One of the leaders of the tax protest movement a couple years ago got something like 50 years, or something. [¶] I don't want to put you people in jail, but you seem to just try to make a mockery of the system, not only by not paying your taxes but by manipulating the system. [¶] I have given you every opportunity to retain counsel. . . ." Exh. 3, RT 10/27/89 pp. 59-79.

The court then offered petitioners the following sentence: One year in county jail on each count, with all but 30 days in county jail suspended on each count, and with a $1000 fine on each count if income tax returns are filed within 15 days; payment of $1,456.76 for case

investigations costs; and payment of back taxes due. Exh. 1; Exh. 2; Exh. 3, RT 10/27/89 pp. 72-73. "Which would mean, said the court, "if you file your income tax returns, in accordance with your probation, within 15 days of today's date, that instead of doing three years, you will do 90 days. . . . [and pay] $3000 as opposed to $30,000," in fines. Exh. 1; Exh. 2; Exh. 3, RT 10/27/89 p. 72.

Petitioners rejected the court's terms of probation. Exh. 1; Exh. 2; Exh. 3, RT 10/27/89 pp. 72-76. Prior to rejecting the terms of probation, petitioner M. Monteleone conferred with her counsel, Mr. Fallman. Exh. 3, RT 10/27/89 pp. 74-75.

On October 27, 1989, the court sentenced petitioners as follows: One year each on Counts I, II, and III, for a total of three years in County Jail, each; $20,000 fine on each count, for a total fine of $60,000, each; and a $1,456.76 restitution fee. Exh. 1; Exh. 2; Exh. 3, RT 10/27/89 p. 78. Petitioners apparently were not remanded into custody. Exh. 3, RT 10/27/89 pp. 77-79.

On November 1, 1989, petitioners filed notice of appeal and application for release on their own recognizance pending disposition of appeal. Exh. 1, p. 8.

On June 4, 1990, petitioners filed appeals in Case Nos. FC28087 and FC28088 in the Superior Court of Solano County. Exh. 8, Appellant's Opening Brief; Exh. 10, Opinion on Appeal. Petitioners were represented by appointed counsel during the appeal, after they signed under penalty of perjury a "Financial Statement on Eligibility For Appointment of Counsel and Reimbursement." Exh. 7.

On August 20, 1990, the Solano Superior Court,

Appellate Department, denied petitioners' appeals. Exh. 10, Opinion on Appeal.

On September 5, 1990, the Solano County Superior Court, Appellate Department denied petitioners' petition for rehearing and application for certification of the case to the California Court of Appeal. Exh. 10, Order Denying Petition for Rehearing and Denying Application for Certification; Exhs. 8 and 9.

While still released on their own recognizance, petitioners filed a Petition for Writ of Habeas Corpus in the California Supreme Court on or about September 25, 1990, in Case Nos. S017634 and S017639. Exh.12; Exh.11.

On October 25, 1990, the California Supreme Court denied the petitions. CR 1, Pet.Exh.I; CR 21-24, Pet.Exh.I.

Also on October 25, 1990, execution of petitioners' three-year sentence in County Jail apparently commenced. Exh. 1, p. 11; CR 1, A. Mont.Pet.,p. 2, ¶5; CR 21-24, Exh. 2, p. 12; CR 2, M. Mont. Pet., p. 2, ¶5.

On November 21, 1990, petitioners filed their petitions for writ of habeas corpus with the United States District Court. CR 1, 2. The petitioners challenged their convictions and sentence alleging deprivation of the right to counsel, failure to meet venue and vicinage requirements, and improper arraignment. As relief they requested their "immediate release . .. from present custody" or for their custodians to "show cause why the petitioner[s] should remain confined and deprived of [their] liberty." CR 1,2.

On or about July 8, 1991, petitioners applied for "bail pending determination of petition for writ of habeas

corpus." CR 25 (A. Mont.); CR 28 (M. Mont.). In her petition M. Monteleone stated that she "was on bail without incident during trial and for 13 months following trial;" that "[b]ecause of [her] incarceration [she had] been removed from [her] position as an Air Traffic Control Assistant," and that "[u]pon [her] release [she] intend[s] to immediately move for reinstatement." CR 28, pp. 1-3. The district court denied the bail petitions on August 26, 1991. CR 26 (A. Mont.); CR 30 (M. Mont.).

On August 29 and August 30, 1991, the Magistrate filed his Findings and Recommendations in the case. *See*, App. B.

With respect to the deprivation of counsel claim, the Magistrate found that petitioners' habeas petitions were "completely lacking in merit on this ground," that the "case was no rush to justice," and that the Court had "never witnessed judicial patience of the sort exhibited by the Solano County bench." App.B; CR 28, pp. 2-14.

Likewise, the Magistrate found "without merit" petitioner's claim that his "First Amendment" rights were violated because the court improperly "demand[ed] . . . that he perform an act contrary to his religious belief . . . and take an oath" in filling out the financial statement required for appointed counsel. Pet. pp. 16-17, 21-22. The Magistrate found the trial court did not err in refusing to appoint counsel, and that the judge reasonably attempted to utilize the least restrictive means possible to have petitioners' attest to their financial status as required for appointed counsel. As the Magistrate observed, petitioners "were simply not willing to perform any task that might get them counsel and get the trial started," and "petitioner herein signed his petition to this court under

penalty of perjury without any problem being raised in this action." CR 28 (A. Mont.), pp. 9-14.

The Magistrate further found meritless petitioners' contentions that their convictions were in violation of the Sixth Amendment vicinage requirements. App. B. The Magistrate observed that it "is clear that California law allows for the prosecution of failure to file tax offenses in the county of residence. Cal. Rev. & Tax. Code § 19407," and that it was only petitioner who presumed that tax actions could only be prosecuted in Sacramento where tax returns are processed. "Petitioner's contention would produce an absurd result," the Magistrate recognized. CR 28 (A. Mont.) pp. 14-15.

Finally, the Magistrate likewise rejected, based on the evidence, petitioners' claims that they were improperly arraigned. App. B.

On or about September 30, 1991, petitioners each filed in the Ninth Circuit a "Petition for Application for a Writ of Mandamus for an Order Commanding Release of Petitioner on Bail Pending Determination of Petition for Writ of Habeas Corpus."

In the petitions, petitioners repeatedly emphasized that "if [they are] not released pending the determination of [their] Writ of Habeas Corpus [their] Petition[s] will become *moot* upon serving out [their] sentence[s]." Pets. ¶ 10, p. 3; M. Monteleone Pet. p. 8, ¶ 25, ¶ 26; A. Monteleone Pet., p. 7, ¶ 24, ¶ 25.

On October 15, 1991, the District Court denied the petitions and adopted the Magistrate's extensive findings issued on August 29 and 30, 1991. CR 28, 31, 33. Petitioners appealed on October 24, 1991. CR 36.

On or about February 18, 1992, petitioners filed

their opening briefs in the Ninth Circuit Court of Appeals.

In his Court of Appeals Opening Brief, petitioner A. Monteleone stated that he "has served his jail sentence and was released from custody on October 17, 1991." Pet. Court of Appeal Open. Brief, p. 5. In her Court of Appeals Opening Brief petitioner M. Monteleone stated she "has served her jail sentence and was released from custody on November 26, 1991." Pet. Court of Appeal Open. Brief, p. 5.

On December 8, 1992, the Court of Appeals dismissed petitioners appeal "as moot." On or about January 21, 1993, petitioners timely filed a "petition for rehearing and suggestion for rehearing en banc." In the rehearing petition, petitioners contended that their appeals were not moot, and set forth the reasons they believed their convictions had collateral consequences. They also asked the Court to allow for further briefing on the issues.

On March 4, 1993, the Ninth Circuit Court of Appeals denied petitioners' petitions for rehearing and "suggestion for rehearing en banc" of the Court's December 8, 1992 Memorandum.

On July 15, 1993, after a hearing, the Solano County Municipal Court granted petitioners credit for time served against their $60,000 fines. App. D. However, the Court did not waive their $1,456.76 restitution fees to the Franchise Tax Board as compensation for their investigatory expenses, and informed petitioners that they were still obligated to pay such restitution fees by June 15, 1994. App. D.

REASONS FOR DENYING THE WRIT

I. This Case Is Not Deserving Of Plenary Consideration By The Court

This case is not deserving of plenary consideration by the Court. The case involves unique factual circumstances, and an unusual and tangled procedural history not susceptible to repetition. *See* App. B, D; Exhs. 1-11. The case does not seek to resolve legal questions of general importance transcending the litigant's narrow interests. Petitioners with the apparent assistance of the tax protest group the "Free Enterprise Society" are involved in extensive self-generated litigation, designed at delaying and abusing court processes to their own benefit. *See*, CR e.g., 18-21, Exh. 4-7; App. B and C; Crowe, *Tax Protest Prison Term Ends for Duo*, Fairfield Daily Republic, Nov. 27, 1991; *see also* Respondent's Court of Appeal briefs.[2/]

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2. Members of the "Free Enterprise Society," apparently believe that taxes are unconstitutional because the Sixteenth Amendment was never properly ratified.

Petitioner A. Monteleone in his "Supplement Number 2 To Motion To Dismiss" filed prior to trial in Solano Municipal Court on September 5, 1989 states that "Defendant herein has challenged the validity of the, so-called, legal tender laws on the basis of a fraudulent Certification of ratification of the Sixteenth Amendment to the United States Constitution." CR 19, Exh. 4. Likewise, in response to the State Franchise Tax Board's letter for taxes due in tax years 1983-1986, petitioners informed FTB in part as follows: "It has come to our attention that the non-apportioned income tax is a *voluntary* tax and congress's original intent and letter of all revenue laws made in pursuant to the passage of the Sixteenth Amendment was a proposed tax measured by the net profit and gain derived from the source and not on the capitol or other

Petitioners who successfully delayed their trials for months could have accepted the leniency of probation after their misdemeanor convictions, but instead elected substantial jail time and fines. Subsequently, petitioners were in custody and able to seek collateral federal habeas review only because they forestalled serving their jail sentences for about one year while they exhausted state court appellate remedies. *See*, CR 28.

Although it is not part of the record below, the State further notes that on July 15, 1993--after petitioners were released from custody--they requested and were granted a waiver of their $60,000 fines as credit for time served. App. D. The Municipal Court did not likewise waive the $1,456.76 in restitution fees to the Franchise Tax Board, but extended the time for payment to June 15, 1994. App. D.

Finally, in any event, the courts below which fully considered the substance of petitioners' appeals found petitioners' claims meritless, and further review of their arguments is unwarranted. *See*, App. B and C.

Accordingly, this fact-specific case with negligible implications is not certworthy.

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property (source). ¶ We have recently received conclusive and irrefutable certified documents pertaining to this from the National Archives in Washington D.C." CR 21, Exhs. 6-7.

In response, the Franchise Tax Board sent petitioners a letter which stated in part as follows:

"The Franchise Tax Board will not respond to correspondence objecting to state taxes on constitutional, religious or moral grounds. The reason for this is that hundreds of Board of Equalization and state and federal court decisions have been reached on such issues finding the arguments and objections to be frivolous and lacking in merit." CR 21, Exh. 6.

II. Federal Habeas Review Is Unwarranted Because Petitioners Have Not Demonstrated That Their Misdemeanor Tax Convictions Have A Material Effect On Present Legal Rights

Review also is unnecessary because petitioners have not met all threshold requirements for federal habeas corpus review of final state court judgments.

The 28 U.S.C. § 2254 statutory requirement of custody is satisfied as long as the petitioner is in custody of the state when the petition for writ of habeas corpus is filed, and release thereafter does not divest the court of its statutory jurisdiction. *Carafas v. LaVallee,* 391 U.S. 234, 238, 242-243 (1968) *overruling Parker v. Ellis,* 362 U.S. 574 (1960); *Engle v. Isaac,* 456 U.S. 107, 113-115, n. 7, 13 (1982).

Mootness, however, is a distinct requirement for federal review. The Court's "impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" *North Carolina v. Rice,* 404 U.S. 244, 246 (1971) *citing Liner v. Jafco, Inc.,* 375 U.S. 301, 306 n.3 (1964).

It is recognized that the "application of Article III to particular cases [is] often dependent upon subtle nuances in the Court's interpretation of the facts . . . [and that in] mootness inquiries . . . the range of factual questions which must be considered is greater than in other justiciability cases." Notes, *The Mootness Doctrine in the Supreme Court*, 88 Harv. L. Rev. 373, 377-378 (1974).

"[T]he principal focus in determining whether a case is moot is upon the existence or non-existence of any 'collateral consequences' that remain from the conviction." *Naylor v. Superior Court of Arizona,* 558 F.2d 1363, 1365-6 (9th Cir. 1977) *cert. denied* 435 U.S. 946 (1978).

Despite petitioners claim otherwise, it was consistent with Ninth Circuit practice for that Court to address the issue of mootness, sua sponte. As the Ninth Circuit properly has emphasized in the past, mootness is not a discretionary matter which a court is free to ignore. "Mootness is not merely a 'ducking device'. . . It goes directly to the jurisdiction and power of the federal courts to act." *Naylor v. Superior Court of the State of Arizona,* 558 F.2d at 1366; see also *Lane v. Williams,* 455 U.S. 624, 629 (1982); *North Carolina v. Rice,* 404 U.S. at 244, 246.

Although it is unclear upon exactly what bases the Ninth Circuit dismissed petitioners' habeas petitions, respondent notes that petitioners were "in custody" when they filed their federal petitions for writ of habeas corpus.

However, no case or controversy exists where, as here, a habeas petitioner's misdemeanor sentence has been served and no present "collateral consequences" remain as a result of the misdemeanor sentence or conviction. *Id.*

During the course of this long litigation, petitioners have failed to demonstrate any substantial collateral consequence flowing from their misdemeanor convictions that should permit them to obtain federal habeas relief.

Indeed, petitioners, themselves, recognized the negligible impact of their convictions and sentence when they requested release on their own recognizance pending determination of their habeas petitions.

Specifically, for example on or about September 30, 1991, following the Magistrate's findings in their cases on August 29 and August 30, 1991, petitioners each filed in the Ninth Circuit a "Petition for Application for a Writ of Mandamus for an Order Commanding Release of Petitioner on Bail Pending Determination of Petition for Writ of Habeas Corpus."

In the petitions, petitioners emphasized in bold type that "if [they are] not released pending the determination of [their] Writ of Habeas Corpus [their] Petition[s] will become moot upon serving out [their] sentence[s]." Pets. ¶ 10, p. 3. Petitioners also stated that:

> "Because of the District Court's large number of civil actions now pending and voluminous record submitted to the district court for review, by the California Assistant Attorney General . . ., petitioner[s] contends [they] will serve [their] sentence prior to the determination of the Petition for Writ of Habeas Corpus therefore mooting [their] Petition[s] for Writ of Habeas Corpus contrary to the holding in *North Carolina v. Rice* (1971 404 U.S. 244); *Flast v. Cohen,* 1968 392 U.S. 83 . . . ." M.Monteleone Pet. p. 8, ¶ 25; A. Monteleone Pet., p. 7, ¶ 24.

Petitioners likewise contended: They "should not have to remain incarcerated, and then released at the last possible moment before serving [their] sentence[s] out thereby preventing [their] Writ of Habeas Corpus from becoming moot. However, it now appears that this is the point that these proceedings have reached. *Boyer v. City of Orlando*, 402 F.2d 966 (5th Cir. 1968). . . ." M.

Monteleone Pet. p. 8, ¶ 26; A. Monteleone Pet. p. 7, ¶ 25.

The allegations set forth in petitioners' Ninth Circuit rehearing petitions, and again in their certiorari petitions, do not dispel petitioners' original candid assessment of impending mootness, or otherwise demonstrate that petitioners' misdemeanor tax offense convictions carry actual legal "collateral" disabilities sufficient to warrant federal habeas review.[3/]

Although it is an important function of our judiciary to protect citizens from erroneous convictions, the mootness inquiry in habeas attacks on state judgments should be a stringent one. *See, Cox v. McCarthy,* 829 F.2d 800, 803-804 (9th Cir. 1987). Where as here habeas relief is sought by out-of-custody state defendants who have had full access to the state appellate process, the federal courts should not be burdened with the broad task of further reviewing all state misdemeanor convictions, without proof of continuing material harm to the

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3. Petitioners complain of the following general collateral consequences as a result of their misdemeanor tax conviction: (1) The "stigma" of being labeled "tax protestors" or "tax evaders" "[g]iven today's climate about paying one's 'fair share' of taxes."; (2) sentence enhancement in future cases; (3) impeachment of credibility in future cases; (4) bail enhancement; and that (5) "Many state, federal, local and private employment forms require disclosure by the applicant of any convictions or sentences served by the applicant [e.g. Federal SF Form 171]." Cert. Pet., pp. 12-15.

Petitioners also complain of the following specific consequences of their misdemeanor tax convictions: (1) M. Monteleone's conviction was "used to terminate her from her job as air traffic assistant with the FAA, as well as keeping her from being re-instated." Cert. Pet. pp. 14-15.

complainants. *See*, 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.4, at 310-311 (2d ed. 1984).

As this Court has observed with respect to the important parameters of collateral habeas review:

> "Collateral review of a final judgment is not an endeavor to be undertaken lightly. It is not warranted absent a showing that the complainant suffers actual harm from the judgment that he seeks to avoid." *Lane v. Williams,* 455 U.S. at 632-633 n. 13.

Accordingly, the bare allegation that a social "stigma" might attach to a conviction should not create the necessary "collateral consequence" predicate for federal habeas corpus relief. *Naylor v. Superior Court, 558 F.2d* at 1365; *see also, Bjerkan v. U.S.,* 529 F.2d 125 (7th Cir. 1975); *Broughton v. North Carolina,* 717 F.2d 147, 148-149 & n. 3 (4th Cir. 1983) *cert. denied* 466 U.S. 940 (1984) ("continued reputational interests" which petitioner has in overturning her criminal contempt conviction" is not "legal consequence" which is remediable in federal habeas petition).

Indeed, such a moral claim rings hollow in this case, where petitioners voluntarily and publicly align themselves with a "Sixteenth Amendment was never properly ratified" tax protest group, and where any alleged employment and financial woes would stem equally from petitioners' decision not to pay *federal* taxes as of 1983. At trial petitioner A. Monteleone told the court that he had resigned from his government job at Mare Island so that the IRS would not continue to levy his paycheck. *See* Exh. 3, 9/20/89 RT 6-11. Petitioner M. Monteleone also

stated "the IRS is levying my paycheck," and that she made only $75 a week. *See* Exh. 3, 9/20/89 RT 6-11.

Likewise, it would be inappropriate to presume that M. Monteleone lost her job at the FAA and is barred from reinstatement solely as a result of her misdemeanor state tax convictions.

It is respondent's understanding that under federal regulations, petitioner M. Monteleone could be removed and barred from FAA employment based upon her failure to pay federal tax debts, and that her conduct in denouncing her tax responsibilities could be just cause for her employers to question her ability to reliably perform her public-safety related job. See App. F, e.g. United States Office of Government Ethics, *Standards of Ethical Conduct For Employees of the Executive Branch*, Part I, Executive Order 12674 and 5 C.F.R. Part 2635 (August 1992) (setting forth requirement that employees "shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as Federal, State, or local taxes that are imposed by law."); Department of Transportation Federal Aviation Administration's *Conduct and Discipline* manual, Chapter 3, § 300 (providing that FAA employees "must conduct themselves while off duty in a manner that will not cause the public to question their reliability and trustworthiness . . .").

Department of Transportation Federal Aviation Administration's *Conduct and Discipline* manual, Chapter 3, §305 (a) specifically provides in part:

> "All employees are expected to discharge their private financial obligations and to maintain a reputation in the

> community for honoring debts. Failure without sufficient excuse or reason to honor valid debts, including claims based on court judgments and tax delinquencies, or to make and adhere to reasonable arrangements for settlement, will constitute grounds for disciplinary action.".

The failure to honor financial obligations is pertinent to petitioner's federal employer regardless of whether petitioner is actually *convicted* of a state tax code misdemeanor, or simply has decided not to pay state or federal income tax, because both relate to the employer's assessment of petitioner's judgment capabilities.[4/]

Furthermore, respondent notes that in these uncertain economic times, petitioner's reinstatement to the FAA or other federal job is hardly guaranteed. Although not part of the record, it is respondent's understanding from speaking with Ms. Jan Proper Supervisory Personnel Manager at the FAA Western Pacific Regional Office that the FAA is not presently hiring persons for the position of

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4. On January 16, 1991, Petitioner M. Monteleone filed in the U.S. District Court an "Emergency Application For Release on Bail Pending Habeas Corpus Determination." CR 5. In the application, petitioner states that her employer would soon be terminating her from her employment due to her absence from work as follows:

"Petitioner has been informed on January 7, 1991, by her place of employment (FAA), that unless she returns to work by January 30, 1991 that she will be considered AWOL and terminated from her job. Petitioner, who applied for work furlough release, was denied such release for the reason that the FAA administrative examination board, upon review of her petition for Habeas Corpus relief, determined that petitioner's confinement was a direct result of her failure to employ counsel in a timely fashion at trial." CR 5.

Air Traffic assistant (the job formerly held by M. Monteleone), and that it may be eliminating such positions by Spring 1994 due to economic and resource considerations.[5]

Petitioners offer no proof that their employment actually has been impeded by virtue of their convictions. And where as here a petitioner has retired and may have no real interest in seeking employment, or where the petitioner has other legal difficulties which also would operate to preclude that petitioner from obtaining a particular job, the law should not presume that petitioner has been occupationally disabled by virtue of a misdemeanor conviction. *Cf., Malloy v. Purvis,* 681 F.2d 736, 737-740 (11th Cir. 1982); *cert. denied*, 460 U.S. 1071 (1983) ("blemish on one's record resulting from one conviction is [not] enough of a collateral consequence to prevent a habeas corpus petition from being moot, where the petitioner is not in custody and where the petitioner has multiple convictions").

It is one thing when a criminal conviction materially affects a person's present ability to remain a licensed professional, or otherwise has effects of a "substantial nature" such as deprivation of basic rights such as "the right to vote and the right to serve on a jury," i.e., consequences more generally associated with felony convictions. *See*, *Bjerkan v. United States,* 529 F.2d at 126-127; *see generally*, Comment, *Civil Disabilities of Felons*, 53

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5. Respondent brings to the Court's attention, these and other facts which are not part of the record below, so that the Court can fully evaluate the merits of granting review and "flush the problems" of this case "at the certiorari stage." *Conway v. Adult Authority,* 396 U.S.107, 109-110 (1969).

Va.L.Rev. 403 (1967). It is entirely another matter when the criminal conviction has only speculative consequences or consequences which would be imposed only in the event of the complainant's own future wrong-doing. Cf. *Aaron v. Pepperas,* 790 F.2d 1360, 1362 (9th Cir. 1986).

A person can control whether or not s/he violates a criminal law and courts should be reluctant to find collateral consequences when the possibility that a petitioner will be adversely affected in the future depends solely upon a petitioner's own misdeeds. *See Lane v. Williams,* 455 U.S. at 632-633, n. 13; Cf. *Reimers v. State of Oregon*, 863 F.2d 630, 632 (9th Cir. 1988).

For similar reasons, petitioners' additional concern that they may be impeached in possible future trials, or otherwise legally handicapped by the blemish on their record resulting from failure to file state tax forms is, in a practical sense, unavailing.

It is a fact that petitioners have not filed tax returns since 1982. Should the matter be raised in the future in any judicial proceeding, petitioners will suffer the same adverse practical consequences from their failure to file federal tax returns--even though the federal government did not pursue a criminal action against them. Failure to file a federal tax return involves the same type of fraudulent irresponsible conduct which underlies their state tax code convictions. It is this underlying conduct, not the *fact* of conviction which can be used to impeach their credibility as trial witnesses. See *People* v. *Wheeler*, 4

Cal.4th 284, 288 (1992).[6/]

Likewise, it is speculation that the misdemeanor convictions would have an adverse legal impact on petitioners should they encounter future legal proceedings. For example, state tax code violations are not, like some designated crimes (e.g., sex and gun offenses), specifically used in sentence enhancement. Similarly, because petitioners skirted no court appearances in this litigation, they probably would not be subject to bail penalties in a future action.

Therefore, while it may be the presumption that convictions carry continuing collateral "legal" consequences in cases brought on direct appeal (see *Sibron v. New York*, 392 U.S. 40, 51, 53-58 (1968); *Pennsylvania v. Mimms*, 434 U.S. 106, 108, n.3 (1977)), such a presumption should not likewise attach in cases where federal habeas relief of state court judgments is sought.

In these circumstances, neither this Court nor others should be compelled to speculate or presume that there are always adverse consequences from the imposition of a criminal sanction. *See*, *North Carolina v. Rice*, 404 U.S. at 244 (remanding to the lower court for a factual determination of whether more serious adverse consequences would flow from a two-year sentence than from a nine-month suspended sentence.).

Otherwise, the collateral consequence doctrine has expanded to such an extent that the mootness inquiry in

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6. Respondent also observes that before such impeachment would be permitted, the trial court generally first would have to determine that the evidence was more probative than prejudicial. *People* v. *Wheeler* 4 Cal.4th at 284.

habeas appeals of state convictions is virtually obsolete, having been replaced by a flat rule that a petitioner should be entitled to have any final state conviction reviewed by the federal courts. Courts have not found "the Supreme Court desired to hold that a conviction in and of itself constituted a collateral consequence" and thus have "refuse[d] to sanction a rule that would effectively abrogate the meaning and purpose underlying the requirement of proving collateral consequences." *See, Malloy v. Purvis,* 681 F.2d at 738-740.

The "doctrine of collateral consequences [should be] a narrow exception to the general mootness rule," and not the exception which swallows the rule. *See, Robbins v. Christianson,* 904 F.2d 492 (9th Cir. 1990) and *see id. at pp. 496-497, dissenting op.*, Noonan, J.

Accordingly, in habeas cases such as this one, speculative nonstatutory disabilities from a state court misdemeanor sentence or conviction such as the effect of the jail term on employment prospects or on a sentence imposed in a future criminal proceeding should be insufficient to save a case from being moot once the sentence has been served. *Lane v. Williams,* 455 U.S. at 631-633; *Carafas v. LaVallee,* 391 U.S. at 237; see also *U.S. v. Sultani,* 704 F.2d 132 (4th Cir. 1983) (appeal from traffic violation was moot after successful completion of probationary period as no collateral consequences from the conviction); *Arnold v. Panora,* 593 F.2d 161, 163-164 (1st Cir. 1979) (challenge to drivers' license suspension moot where collateral consequences such as damage to reputation and possible adverse treatment by insurance companies were practical not legal); *Cancino v. Craven,* 511 F.2d 1371, 1373 (9th Cir. 1975) *cert. denied* 423 U.S.

875 (1975) (Payment of $50 fine mooted appeal from an attorney's contempt conviction, despite the contention that the conviction might have consequences on his future career for political office).

A material effect on the petitioner's present legal rights should be necessary to permit habeas review of a state court misdemeanor conviction.

Because petitioners' unsupportable allegations here do not satisfy this burden or any Article III threshold, the case is properly dismissed as moot.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

In the alternative, we request that the Ninth Circuit Court of Appeals order dismissing the habeas petitions be vacated and the matter be remanded to the Court of Appeals for a decision on the merits.

Dated: September 3, 1993.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 92-1940

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ANTHONY S. MONTELEONE, et al.
Petitioner,

v.

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SOLANO JUDICIAL DIST., et al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO BRIEF OF RESPONDENT STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed December 8, 1992]

MARY ANN CUMMINS MONTELEONE, Petitioner-Appellant, v. MUNICIPAL COURT CA COUNTY OF SOLANO NORTHERN SOLANO JUDICIAL DISTRICT, et al., Respondents-Appellees.	No. 91-16725 D.C. No. CV-90-01448-LKK
ANTHONY S. MONTELEONE, Petitioner-Appellant, v. MUNICIPAL COURT CA COUNTY OF SOLANO NORTHERN SOLANO JUDICIAL DISTRICT, et al., Respondents-Appellees.	No. 91-16804* D.C. No. CV-90-01447-LKK MEMORANDUM**

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Submitted November 23, 1992***

Before: SCHROEDER, FLETCHER and NOONAN, Circuit Judges

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* We consolidate these cases on our own motion.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Mary Ann Cummins-Monteleone and Anthony S. Monteleone appeal the district court's denial of their 28 U.S.C. § 2254 habeas petitions. They have both been released from custody since the district court denied their petitions, and have only to pay a $60,000 fine to complete their sentences. Because they are not presently in custody and have not demonstrated that they face future custody, this court lacks jurisdiction to consider their appeals. See Rule 2, Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254; Dremann v. Francis, 828 F.2d 6, 7 (9th Cir. 1987) (per curiam); see also United States v. Michaud, 901 F.2d 5, 7 (1st Cir. 1990) (per curiam). Therefore, we dismiss their appeals as moot.

DISMISSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MARY ANN CUMMINS-MONTELEONE,

Petitioner,

vs.

MUNICIPAL COURT OF CALIFORNIA, et al.,

Respondents.

_____/

No. CIV S-90-1448 LKK GGP P

FINDINGS AND RECOMMENDATIONS

[Filed 8/29/91]

I. INTRODUCTION

Petitioner was convicted in state court (Solano County Municipal Court) on six counts of violations of the state Revenue and Taxation Code §§19406, 19401 (a). After a lengthy pretrial process occasioned by continuances requested by petitioner to seek counsel, petitioner was compelled to represent herself. Petitioner chose not to participate at her trial. Petitioner was found guilty of wilfully failing to file state tax returns. All counts were prosecuted as misdemeanors; petitioner received three consecutive one year sentences. Petitioner also states that she was sentenced to additional time in jail because she was unable to pay a fine (jail time imposed at a rate of $30.00/day). Petitioner's sentence per se is

not at issue in this habeas corpus petition.[1/]

Petitioner raises three issues in her habeas petition:

1. She was denied her Sixth Amendment right to counsel (the trial court did not give her sufficient time to acquire counsel and improperly sought to have her "swear" to her financial condition to qualify for appointed counsel);

2. Petitioner's trial was held in violation of the vicinage rights of the Sixth Amendment;

3. Petitioner was improperly arraigned (Sixth Amendment).

The facts relating to each issue are set forth in individual sections. The state concedes exhaustion of the issues set forth in this petition. For the reasons given at length herein, the petition for habeas corpus should be denied.

II. THE SIXTH AMENDMENT RIGHT TO COUNSEL

A. Facts

The First Continuance

On October 9, 1988, complaint No. F84282CR was filed in Solano County Municipal Court. Appendix to Answer, Exhibit 1.

Petitioner appeared for arraignment on April 4, 1989. During this short hearing, petitioner represented that she was "working on" acquiring counsel. She was advised that she was charged with six counts of failing to file a state

---

1. Petitioner's husband was convicted of identical charges. He also was compelled to represent himself after numerous continuances had been granted for the purpose of acquiring counsel. He has filed a habeas petition almost identical to the one discussed here (CIV-S-90-1447 LKK). The Findings and Recommendations for that case will be filed separately.

income tax return and also given police reports related to the charge. The matter was continued to April 25, 1989, so that she could appear with counsel. Appendix to Answer, Exhibit 3. RT April 4, 1989.[2/]

The Second Continuance

On April 25, 1989, petitioner's matter was continued again. She again represented that she was working on acquiring counsel, that she had sent out 25 letters with about six negative responses. Petitioner sought a continuance to acquire counsel but refused to waive her rights to a speedy trial. The matter was continued to May 9, 1989. RT April 25, 1989.

The Third Continuance

By May 9, 1991, petitioner still had not retained counsel. She again explained to the court that the attorneys that she had written to were not responding to her letters. The court advised:

> In other words, you go to a lawyer, you talk to an attorney, he quotes you a fee, and you pay him, and you have a lawyer. That's the way it works. Writing a letter will not cut it. They're not going to listen to you in a letter, because you haven't paid them anything. So I suggest, if you know an attorney, contact him or her. If not, look in the phone book, consult with an attorney and arrange some type of fee arrangement.

RT May 9, 1989, 3:11-19.

---

2. Unless otherwise indicated, the reporter's transcripts are contained within Exhibit 3 of the Appendix to the Respondent's Answer.

The case was continued to May 22, 1989, so that petitioner could get a lawyer. Petitioner was informed that this was the last continuance. RT May 9, 1989.

The Fourth Continuance

Petitioner appeared on May 22, 1989, and in the company of James Fracchia, attorney. The pertinent colloquy is as follows:

> Mr. Fracchia: In this matter, she's been in contact with our office about the possibility of retaining us. She's not done so yet. She advised me she had counsel and plea this morning, and I indicated that I would contact the court and --
>
> The Court: When is she going to retain you?
>
> Mr. Fracchia: Well, at this stage, there's two things going on. We're reviewing defenses with Ms. Cummins; and also, she has not yet retained us. I would ask two or three weeks for that to be put over.

RT May 22, 1989.

The matter was continued to June 19, 1989.

The Fifth Continuance

On June 19, 1989, Mr Fracchia contacted the court stating that "he's still looking it over." The case was continued until July 25, 1989. RT June 19, 1989.

The Sixth Continuance

Petitioner appeared on July 25, 1989, without counsel, but explained to the court that she had discussed her case with an attorney (Fracchia). However, Fracchia had not reviewed the material yet. Petitioners was informed:

> The Court: We can't keep putting the matter over. It started in April and -- You might want to try another lawyer if--
> Ms. Cummins-Monteleone: I have worked so hard with him, and I feel good with him.
> The Court. He's not in court. See, that's the problem. Until he appears in court, he can't do this case. We put the matter over, this is the sixth time we've had it on for counsel and plea starting in April, and you still don't have a lawyer.

Nevertheless, the matter was put over to August 15, 1989, so that she could be present with her lawyer. RT July 25, 1989.

Seventh Continuance

On August 15, 1989, petitioner appeared in court without a lawyer. An increasingly exasperated trial judge was again told that although she was working diligently to obtain a lawyer, she had not yet been successful. In response to the judge's question, she stated that she had the funds to retain counsel, but that with a few exceptions, the lawyers were too busy or could not take her case (she did not explain why she had not retained the lawyers that could take her case). Petitioner stated that she thought she had made a "breakthrough" with two lawyers; the matter was continued two weeks to August 29. 1989.

The Case is set for Trial

On August 29, 1989, petitioner appeared without counsel. The court stated:

> I've never, in seven years on the bench, seen anybody take as long as you to hire a

> lawyer. There's an indication that you probably are a person who's trying to delay the system for your own benefit, and from what I saw from the co-defendant [her husband] in court.

RT August 29, 1989, 13:2-6.

The court went on to finally find that she had been abusing the system, and entered a plea of not guilty on her behalf. Trial was set for September 19, 1989.

Despite having stated at the previous hearing that she had the funds to retain counsel, petitioner then asked the court to appoint counsel. The court asked petitioner to fill out the financial form. The following colloquy ensued:

> The Court: All right. Fill out a financial declaration under penalty of perjury, and I'll recall your case to see if you qualify.
>
> Ms. Cummins-Monteleone: Your Honor, on filling out that form, I think that I might be under self-incrimination if I do that.
>
> The Court: It's not self-incrimination. Everybody in the State of California, should they seek the assistance of a public lawyer, it's required by the Court, has to fill out a form.
>
> Ms. Cummins-Monteleone: Well --
>
> The Court: Basically, the form sets out your assets. If you're telling me you make $75 a week, you don't have a problem, put $75 on the form.
>
> Ms. Cummins-Monteleone: The IRS, I believe, has me under investigation, and

filling out the form could be a form of self-incrimination.

The Court: I'm not concerned about collateral self-incrimination. I'm sure the IRS knows how much you earn, essentially, if you work for the FAA.

Ms. Cummins-Monteleone: Well, Your Honor, if you want me to fill that out, could you appoint me counsel to talk to me to fill that out?

The Court: No.

Ms. Cummins-Monteleone: I'm afraid I'll be self-incriminating myself.

The Court: If you want me to appoint a Public Defender, you'll have to fill out a financial declaration.

You say you work for the FAA?

Ms. Cummins-Monteleone: FAA.

The Court: Full time?

Ms. Cummins-Monteleone: Yes.

The Court: What are you a GS-0? You work full-time for the FAA and make $75 a week?

Ms. Cummins-Monteleone: Well, Your Honor, I believe that the IRS has -- I think it's called a levy.

The Court: The Federal Government has a levy against your wages?

Ms. Cummins-Monteleone: Uh-huh.

The Court: Well, I need that alleged in the form so I can figure out what you earn.

Ms. Cummins-Monteleone: Is that form

taking an oath?

The Court: You'll sign it under penalty of perjury like everyone else in the State of California.

Ms. Cummins-Monteleone: If it's taking an oath, I can't take an oath. Its against my religion to take an oath.

The Court: You can affirm it.

Ms. Cummins-Monteleone: And affirming is taking an oath.

The Court: Then I can't appoint you a lawyer. Seems like this is a continuing pattern, trying to manipulate the Court. At some point, it's got to come to an end.

You tell me you work for the FAA making $75 a week, you say it's a fifth amendment privilege because the Federal Government is after you. I say you have to sign it under penalty of perjury, you say you can"t swear. Then I say you can affirm it under perjury, and you say you can't affirm. Then I can't help you.

Ms. Cummins-Monteleone: Could you guarantee me on the record I'm not swearing if I sign that paper?

The Court: I can guarantee you that the document speaks for itself.

Ms. Cummins-Monteleone: Couldn't guarantee me it's not an oath?

The Court: It's an oath. If you lie on that form, the District Attorney can prosecute

> you for perjury, felony perjury, yes.[3/] That's because the taxpayers don't want to pick up the bill for attorneys for those who don't qualify for public assistance of the Public Defender. That's the bottom line.

RT August 29, 1989, 15:3-17:18.

The court notes that petitioner herein signed her present habeas petition under penalty of perjury without any problem at all.

Petitioner was told to get a lawyer by the trial date -- September 19, 1989. RT August 29, 1989.

The Eighth Continuance

On September 19, 1989, petitioner appeared without counsel. She filed a disqualification motion against the trial judge, which under state law is automatically granted upon a first request. After discussing the counsel matter again, the jury trial was continued to the next day. RT September 19, 1989.

Trial

On September 20, 1989, petitioner appeared with her husband. She informed the court that she had retained counsel (Fallman), but that he could not appear on account of civil depositions. Petitioner informed the court that she had just retained him "a couple days ago." RT September 20, 1989, 3:17-5:14. The court refused to

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3. This court views the trial court's definition of "oath" as a statement in the generic sense to tell the truth. Petitioner has no right to ask the court to guarantee that a statement under penalty of perjury will satisfy her religious scruples.

grant a continuance based on the fact that the attorney had not requested the continuance himself. RT September 20, 1989, 25:3-24.[4]

A further, lengthy discussion took place concerning appointed counsel. For the most part, this discussion was an extended repeat of the discussion quoted above, see, infra, IIC. Neither petitioner nor her husband would sign the appointment of counsel form under penalty of perjury. No matter what word was suggested to describe what act would be performed by signing the document, the act was found to be offensive to their (petitioner and her husband) religious beliefs. RT September 20, 1989, 6-23. Petitioners were convicted at trial after refusing to participate in the trial.[5]

Sentencing

Sentencing was continued by the trial court in order for petitioner to appear with the counsel that she had

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4. Petitioner stated to the court that her counsel arrangement was just finalized "the other day". In a declaration filed by the attorney (Fallman) in the state habeas proceeding, the attorney related that he had agreed to represent her on August 22, 1989, if she would pay the fee. Addendum VII to state habeas petition. The declaration continues in a confusing manner that he again agreed to represent the petitioner on September 19, 1989, if she would pay the agreed upon retainer. The lawyer stated that he had civil business to conduct on the scheduled day of the trial. The lawyer declared that if a continuance had been granted, and if petitioner had paid him the retainer, he would have taken the case. This court has accepted these facts.

5. It does not appear from the record that petitioner was given any Faretta (waiver of counsel) rights. However, that issue was not raised in the state habeas petition, nor is it raised here. Therefore, it will not be discussed. Moreover, it is apparent from the record that petitioner knew of the problems in representing herself.

retained. RT September 20, 50:5-51. On October 3, 1989, the matter was again continued because petitioner's attorney did not appear. Petitioner explained that her attorney was going to handle the "new trial" for them (assuming their motion was granted) -- she did not have the funds to retain him for the new trial motion. The matter was continued again to October 24, 1989, so that attorney Fallman could appear at the motion for new trial hearing and sentencing. RT October 3, 1989, p. 57-58. On October 24, 1989, petitioner appeared; her attorney was in the courtroom but was not representing her because he would only represent her if she received a new trial. RT October 24, 1989, p. 59-61.

The sentencing judge denied the motion for new trial and proposed to place petitioner on probation and ninety days concurrent jail time if the petitioner filed tax returns as a condition of probation. Petitioner refused probation on these terms, and was thereafter sentenced to other maximum time permissible under state law.

B. The Trial Court Did Not Err In Refusing To Grant Any Further Continuances

The entire legal issue is summed up in the case of United States v. Kelm, 827 F.2d 1319 (9th Cir. 1987) (a failure to file tax return case):

> When a criminal defendant's constitutional right to secure counsel of his choice conflicts with the trial judge's discretionary power to deny continuances, the reviewing court must balance several factors in "fair and reasonable." United States v. Studley, 783 F.2d 934, 938 (9th Cir. 1986). Where a

> defendant's conduct is "dilatory and hinders the efficient administration of justice," a court may deny a continuance even if it results in the defendant's being unrepresented at trial. United States v. Leavitt, 608 F.2d 1290, 1293 (9th Cir. 1979).

United States v. Kelm, 827 F.2d at 1322.

The factors set forth at footnote 2 of the Kelm opinion are: inconvenience to the witnesses, parties, court; whether other continuances have been granted; whether legitimate reasons exist for further continuances; whether the delay is defendant's fault; and prejudice to the defendant.

There does not need to be an extensive discussion of these factors in light of the factual record in this case. It is quite obvious that the prosecution and its witnesses were being inconvenienced as well as the court. Many continuances have been granted. The trial court found that the petitioner had been purposefully dilatory in her request for yet more continuances. Finally, although the defendant was prejudiced in her self-representation, if this factor was dispositive, a trial court could never deny a continuance of trial when counsel had not been retained.

This court has never witnessed judicial patience of the sort exhibited by the Solano County bench. Petitioner's case was no rush to justice. Petitioner's habeas petition is completely lacking in merit on this ground.

C. The Trial Court Did Not Err In Refusing To Appoint Counsel

Petitioner does not contest, nor could she in a

federal habeas petition, that state law required the signing of the financial form under the penalty of perjury. Given that state law mandated the penalty of perjury requirement, the issue here is whether the Sixth Amendment is violated when counsel is not appointed on account of a defendant's failure to execute the form.

Several federal cases have grappled with this issue. United States v. Ellsworth, 547 F.2d 1096 (9th Cir. 1976); United States v. Gravatt, 868 F.2d 585 (3rd Cir. 1989); United States v. Saroun, 834 F.2d 1358 (7th Cir. 1987). All three cases require defendants to fill out the financial affidavits under penalty of perjury, see, e.g., Gravatt, 868 F.2d at 591. The three cases recognized that information on the form could pose Fifth Amendment self-incrimination problems, but that those problems could be worked out by sealing the form or holding in camera hearings. Self-incrimination is not at issue in the present petition.[6/]

Thus, the only issue concerning execution of the financial affidavit is whether the trial judge unreasonably required a signature under penalty of perjury. Both sides to this dispute cite Gordon v. State of Idaho, 778 F.2d

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6. Although petitioner referenced a self-incrimination concern in the trial court, she did not exhaust the issue in her state habeas proceeding. This court has fully reviewed the papers filed with the California Supreme Court; the only issue raised with respect to appointed counsel is the issue concerning "swearing" to the accuracy of the form. This court cannot review an unexhausted issue that was not fairly presented to the California Supreme Court. Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986). This court offers no opinion on the outcome if the issue had been raised in the state habeas proceedings.

1397 (9th Cir. 1985)[7]. In Gordon, the trial court had dismissed a civil action because the plaintiff had refused to swear or affirm before testifying at his deposition. The Ninth Circuit reversed noting that when one's First Amendment rights run counter to governmental rules or policies, the government must use the least restrictive means possible to accomplish its important policy in order for its rules to pass muster under a First Amendment analysis. The court held that a precise verbal formula was unnecessary to accomplish the purpose of impressing the witness with the need to tell the truth. However, not mentioned by petitioner, is the further holding of the court that an agreement by the plaintiff to testify under penalty of perjury with the knowledge that he could be prosecuted for perjury was appropriate. Gordan, 778 F.2d at 1401. It is clear that the trial court only wanted the petitioner here to execute the financial declaration under penalty of perjury. The trial court suggested numerous ways for this to be accomplished. In addition to the previously quoted colloquy, the later colloquy occurred:

> Ms. Cummins-Monteleone [referring to the appointment of counsel for her husband]: "You're stating that the only way you will give him counsel is for him to sign it under penalty of perjury?
> The Court: Right.

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7. Respondent cited this case in his index of cases, but his brief is devoid of reference to the case. It appears that respondent's counsel did little more than copy the district attorney's brief in state court, and present it to this court. Moreover,k Respondent's general reliance on state cases in this federal habeas proceeding has been unhelpful.

Ms. Cummins-Monteleone: All right.
The Court: That's the way it works. (Petitioner's husband then went on stating that he wanted to sign it under duress)

RT September 20, 1989, 17:13-18.

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The Court: Do you understand that you're signing that under penalty of perjury? For the record, do you understand that?
Mr. Monteleone: That's an unsworn statement. That's not--
The Court: we can swear you and make it formal. I mean, I want to satisfy you. (emphasis added).
Mr. Monteleone: I refuse...

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The Court: Let me ask you this: Do you understand, by signing this, that you're signing it under penalty of perjury?
Mr. Monteleone: No, I don't.
The Court: You don't understand it?
Mr. Monteleone: No, I don't.
The Court: What is it you don't understand?
Mr. Monteleone: I understand that's a sworn statement, and you can't force me to take an oath.

RT September 20, 1989, 20:15-21:8.

This colloquy and the previously quoted colloquy clearly demonstrate that the trial court was attempting to utilize the least restrictive means possible to accomplish the purpose of having the document executed under penalty of perjury. The trial court was willing to call it anything that the petitioner and her husband wanted. However, both the petitioner and her husband (who were conferring together during this colloquy as reflected in the record) were simply not willing to perform any task that might get them counsel and get the trial started. The court again notes that petitioner herein signed her petition to this court under penalty of perjury without any problem being raised in this action. This fact coupled with a review of the record clearly shows that petitioner was not being deprived of any First Amendment right when she was asked to sign the form under penalty of perjury.[8/]

Moreover, this court notes the recent Supreme Court case of Employment Div. of Human Resources v. Smith, 110 S.Ct. 1595 (1990), which significantly lightened the burden to be borne by a state when its law becomes entangled with a person's professed religious beliefs. It may well be that Gordon is no longer the law. Nevertheless, it is not necessary to make that legal determination here because petitioner does not prevail even under the more stringent Gordon test.

III. THE VICINAGE ISSUE

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8. No discussion is necessary to find that, in our common law system, it is important that certain information or testimony be made to courts under penalty or perjury.

Petitioner is correct in asserting that the vicinage provision of the Sixth Amendment is important, Johnston v. United States, 351 U.S. 215 (1956), but she is mistaken with respect to its application. The Constitution only demands that the criminal trial be held at the "state and district" where the crime was committed; it does not purport to define the locale of the commission of various crimes.[9] It is perfectly within the rights of a state or the federal government to define the place of the commission of a crime -- even to define it in such a way that it can be committed in more than one place. See, e.g., United States v. Anderson, 328 U.S. 699 (1946). Petitioner presumes that the place of commission (or omission) for failure to file a tax return is Sacramento, California, merely because returns are ultimately processed there.

It is clear that California law allows for the prosecution of failure to file tax offenses in the county of residence. Cal. Rev. and Taxation Code § 19407. This venue provision is in complete agreement with vicinage decisions that hold the place where an act is to be performed is the proper vicinage for the prosecution of a crime. Johnston v. United States, supra. In United States v. Hoover, 139 F.Supp. 895 (W.D. Pa. 1955), affirmed 233 F.2d 870 (3rd Cir. 1956) an act of tax evasion was properly tried where the return was "signed and tendered,"

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9. Respondent attempts to raise an issue that the Sixth Amendment vicinage provisions do not apply to state crimes. Respondent claims "many cases" establish this fact. However, respondent does not cite to a single case. This court does not consider a matter at issue and subject to resolution by the court unless the party raising the issue makes some attempt to city authority.

and not where the return was "filed" with appropriate state agency.

In the present case, the only logical place for the failure to file a tax return is the locale where the return would have been prepared and tendered but for the criminal act of failing to tender it. Petitioner would assert that everyone fails to file a tax return must travel to Sacramento for a criminal trial with resultant great disruption in their personal lives, and at some considerable expense. Petitioner's contention would produce an absurd result. It completely lacks merit here.

IV. NO CONSTITUTIONAL ERROR OCCURRED IN PETITIONER'S ARRAIGNMENT

The trial court in a colloquy admirably summed up the type of case involving petitioner, and its simple issue:

> You don't have any oil drilling in Oklahoma. There's no issue of tax shelters. Basically, did you file, did you not file? Can the prosecution prove that?

RT September 20, 1989, 18:19-21.

Petitioner's feigned ignorance of the charges against her is frivolous. The misdemeanor complaint filed against petitioner (Appendix to Answer, Exhibit 1) notifies her of the statutory section violated, the date of violation, and a short, but informative description of the crime. The court told her at her first appearance that she was being prosecuted for failing to file tax returns. RT April 4, 1989. See also, RT August 29, 1989, 13:26-28. She had written letters prior to any formal charge attempting to convince the tax authorities that she was not obligated to file a tax return, see e.g., documents in Exhibit 6

(appendix to Answer).

This is not a case about a person who chose to plead guilty, but was not advised of all her rights, including the nature of the crime and the penalties involved. This is a case where a not guilty plea was entered on behalf of petitioner; she went to trial and was convicted. "The Sixth Amendment guarantees a criminal defendant a fundamental right 'to be informed of the nature and the cause of the accusation'" [citation omitted]. By including the elements of the offense, [a charging document] informs the defendant of the charges against him [citation omitted]." Lincoln v. Sunn, 807 F.2d 805 (9th Cir. 1987). While state statutes or court rules may require more than the constitutional minimum, the essence of the Sixth Amendment right to be given notice of the charges requires only that a defendant have the opportunity to prepare a defense to the charges on their merits. Obviously, such was the case here.

V. CONCLUSION

The court recommends that the petition for habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty days after being served with these findings and recommendations, any party may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Greenhow v. Secretary of Health and Human Services, 863 F.2d 633

(9th Cir. 1988).

DATED: August 28, 1991

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UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY S. MONTELEONE,

Petitioner,

vs.

MUNICIPAL COURT OF CALIFORNIA, et al.,

Respondents.

_____/

No. CIV S-90-1447 LKK GGP P

FINDINGS AND RECOMMENDATIONS

[Filed 8/30/91]

I. INTRODUCTION

Petitioner was convicted in state court (Solano County Municipal Court) on six counts of violations of the state Revenue and Taxation Code §§ 19406, 19401(a). After a lengthy pretrial process occasioned by continuances requested by petitioner to seek counsel, petitioner was compelled to represent himself. Petitioner chose not to participate at his trial. Petitioner was found guilty of wilfully failing to file state tax returns. All counts were prosecuted as misdemeanors; petitioner received three consecutive one year sentences. Petitioner also states that he was sentences to additional time in jail because he was unable to pay a fine (jail time imposed at a rate of $30.00/day). Petitioner's sentence per se is not

at issue in this habeas corpus petition.[1/]

Petitioner raises four issues in his habeas petition:

1. He was denied his Sixth Amendment right to counsel;

2. He was denied his First Amendment right to free exercise of religion (trial court refused to appoint counsel because petitioner would not "swear" to his financial condition when it violated his spiritual beliefs);

3. Petitioner's trial was held in violation of the vicinage rights of the Sixth Amendment;

4. Petitioner was improperly arraigned (Sixth Amendment).

The facts relating to each issue are set forth in individual sections. The state concedes exhaustion of the issues set forth in this petition. For the reasons given at length herein, the petition for habeas corpus should be denied.

II. THE SIXTH AMENDMENT RIGHT TO COUNSEL

A. Facts

The First Continuance

On October 9, 1988, complaint No. F84281CR was filed in Solano County Municipal Court. Appendix to Answer, Exhibit 1. Petitioner appeared for arraignment on April 6, 1989. During this short hearing, petitioner requested a continuance to seek counsel. He was advised that he was charged with six counts of failing to file a state income tax return and also given paperwork related

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1. Petitioner's wife was convicted of identical charges. She also was compelled to represent herself after numerous continuances had been granted for the purpose of acquiring counsel. She has filed a habeas petition almost identical to the one discussed here (CIV-S-90-1448 LKK). The Findings and Recommendations for that case will be filed separately.

to the charge. The matter was continued to May 11, 1989, so that he could appear with counsel. Appendix to Answer, Exhibit 3. RT April 6, 1989.[2/]

The Second Continuance

By June 1, 1989, petitioner still had not retained counsel. He explained to the court that he was "still in the process of working things out" with Mr. Fracchia as to defense, price, and whether Mr. Fracchia would even take the case. When the court asked when petitioner would have all the money together, petitioner indicated that the money was not the problem, it was whether Mr. Fracchia would take the case.
RT June 1, 1989.

The matter was continued to June 21, 1989, so that petitioner could get a lawyer.

The Fourth Continuance

Petitioner appeared on June 21, 1989. He indicated that he had in fact retained Robert Fracchia as counsel, but that counsel had not realized the hearing was set for that date. The court continued the matter until July 24, 1989. RT June 21, 1989.

The Fifth Continuance

On July 24, 1989, petitioner appeared without counsel. He stated that he was presently conferring with Robert Fracchia, but that he would not know more until Mr. Fracchia returned to town on August 8, 1989. Petitioner indicated that he had also contacted two more attorneys, Ron Peters and Ramond Sweeney. The court

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2. Unless otherwise indicated, the reporter's transcripts are contained within Exhibit 3 of the Appendix to the Respondents' Answer.

granted another continuance to August 14, 1989, the first available counsel plea day after Mr. Fracchia's return, and warned petitioner to "[m]ake sure you have an attorney here." RT July 24, 1989.

The Sixth Continuance

Petitioner appeared on August 14, 1989, without counsel. He stated that Mr. Fracchia would not take the case because of "serious disagreements" in the presentation of the defense." The court stated that "[t]his has gone on long enough," and entered a plea of not guilty and no time waiver on petitioner's behalf. The court warned petitioner that it would be to his disadvantage if he appeared without counsel at pretrial. Petitioner objected. Pretrial was set for August 24, 1989. RT August 14, 1989.

The case is set for Trial

On August 24, 1989, petitioner appeared in court without a lawyer. At that time, petitioner indicated that he wanted the court to appoint counsel for him. When petitioner stated that he made $2,800 a month, the court responded that he would not qualify for appointment of counsel. The trial judge became increasingly exasperated as petitioner explained the numerous letters he had sent and the replies he had received. The following ensued:

> The Court: You don't need replies... [T]here's 130,000 lawyers in California, probably 90,000 doing criminal defense who would love to take your money. All you do is walk into their office --
>
> Mr. Monteleone: There's a lot of competent counsel. I'm looking for counsel adequate and competent in the field of taxation...

> The Court: ...[T]he allegation doesn't require expertise, just filing a return. That's the issue. Pretty simple. There's no tax expertise needed in filing a return...

RT August 24, 1989 2:15-27.

When petitioner indicated that he had appointments set up with two more attorneys, the court stated:

> We can't go any further. The matter's been put over four times for counsel and plea. The matter started in April. You appear -- I mean, I've had the same type of thing with other people that are alleged tax protesters -- I don't know if you are -- but we've had the same problem, where they -- seven or eight counsel and pleas. Went through thousands of cases through this court in months, and the only cases I see where we have continuances, delaying tactics of seeking counsel, with 130,000 lawyers in California, and inability to find counsel, it in these type of cases. Another lady running through court, same as you. You and she are the only persons I've had in court who have sent out letters to attorneys instead of going to their offices.

RT August 24, 1989, 3:12-25. After indicating that he would set trial date, the trial judge stated that "[i]f you can't find counsel before that date, then I think the court has done everything possible..." RT August 24, 1989, 3:28 - 4:2. Later the court said "I don't buy the story you can't

find a lawyer". RT 3:26-27. The court then set jury trial for September 19, 1989, telling petitioner "[y]ou'll have plenty of time to hire a lawyer between that time." RT August 24, 1989, 6:9-10.

The Seventh Continuance

On September 19, 1989, petitioner and his wife appeared without counsel. Petitioner filed a disqualification motion against the trial judge, which under state law is automatically granted upon a first request. After discussing the counsel matter again, the jury trial was continued to the next day. RT September 19, 1989.

Trial

On September 20, 1989, petitioner appeared with his wife. When petitioner indicated he wished his request for appointment of counsel to be heard first, the court responded:

> It's obvious to the Court that what you were doing was, basically, delaying the Court process by indicating you were mailing letters out to attorneys. But in any event, it was the Court's feeling you did not intent (sic) to retain counsel; obvious you were doing nothing more than dealing with dilatory obstruction of process to delay this matter in Court... You've had until today to retain counsel.

RT September 20, 1989, 3:7-16.

At that point ensued a lengthy interaction between petitioner, his wife and the court. Neither petitioner nor his wife would sign the appointment of counsel form under penalty of perjury. No matter what word was suggested to describe what act would be performed by

signing the document, the act was found to be offensive to their (petitioner and his wife) religious beliefs. RT September 20, 1989, 6-23.

The court notes that petitioner herein executed the verification to his federal court habeas petition under penalty of perjury with no problem being raised. Petitioners were convicted at trial after refusing to participate in the trial.

Sentencing

Sentencing was continued by the trial court so that petitioner's wife could appear with counsel. RT September 20, 50:5-51. On October 3, 1989, the matter was again continued because the attorney did not appear. Petitioner's wife explained that her attorney was going to handle the "new trial" for them (assuming their motion was granted) -- she did not have the funds to retain him for the new trial motion. The matter was continued again to October 24, 1989, so that attorney Fallman could appear at the motion for new trial hearing and sentencing. RT October 3, 1989, p. 57-58. On October 24, 1989, petitioner appeared; his wife's attorney was in the courtroom but was not representing her because he would only represent her if she received a new trial. RT October 24, 1989, p. 59-61.

The sentencing judge denied the motion for new trial and proposed to place petitioner on probation and ninety days concurrent jail time if petitioner filed tax returns as a condition of probation. Petitioner refused on these terms and was thereafter sentenced to the maximum time permissible under state law.

B. The Trial Court Did Not Err In Refusing To Grant Any Further Continuances

The entire legal issue is summed up in the case of United States v. Kelm, 827 F.2d 1319 (9th Cir. 1987) (a failure to file tax return case):

> When a criminal defendant's constitutional right to secure counsel of his choice conflicts with the trial judge's discretionary power to deny continuances, the reviewing court must balance several factors in determining whether the trial court's conduct was "fair and reasonable." United States v. Studley, 783 F.2d 934, 938 (9th Cir. 1986). Where a defendant's conduct is "dilatory and hinders the efficient administration of justice," a court may deny a continuance even if it results in the defendant's being unrepresented at trial. United States v. Leavitt, 608 F.2d 1290, 1293 (9th Cir. 1979).

United States v. Kelm, 827 F.2d at 1322.

The factors set forth at footnote 2 of the Kelm opinion are: inconvenience to the witnesses, parties, court; whether other continuances have been granted; whether legitimate reasons exist for further continuances; whether the delay is defendant's fault; and prejudice to the defendant.

There does not need to be an extensive discussion of these factors in light of the factual record in this case. It is quite obvious that the prosecution and its witnesses were being inconvenienced as well as the court. Many

continuances had been granted. The trial court found that petitioner had been purposefully dilatory in his attempt to retain counsel. At first, petitioner represented that he had in fact retained counsel, then indicated that he wanted counsel appointed but refused to sign the financial declaration necessary for appointment. Finally, although the defendant was prejudiced in this self-representation, if this factor was dispositive, a trial court could never deny a continuance of trial when counsel had not been retained.

This court has never witnessed judicial patience of the sort exhibited by the Solano County bench. Petitioner's case was no rush to justice. Petitioner's habeas petition is completely lacking in merit on this ground.

C. The Trial Court Did Not Err In Refusing To Appoint Counsel

As referenced in the facts, petitioner at one time stated that "money was not the problem" in obtaining counsel. Despite this assertion, petitioner sought appointed counsel on the first of trial.

Petitioner does not contest, nor could he in a federal habeas petition, that state law required the signing of the financial form under penalty of perjury. Given that state law mandated the penalty of perjury requirement, the issue here is whether the Sixth Amendment is violated when counsel is not appointed on account of a defendant's failure to execute the form.

Several federal cases have grappled with this issue. United States v. Ellsworth, 547 F.2d 1096 (9th Cir. 1976); United States v. Gravatt, 868 F.2d 585 (3rd Cir. 1989); United States v. Saroun, 834 F.2d 1358 (7th Cir. 1987).

All three cases require defendants to fill out the financial affidavits under penalty of perjury, see, e.g. Gravatt, 868 F.2d at 591. The three cases recognized that information on the form could pose Fifth Amendment self-incrimination problems, but that those problems could be worked out by sealing the form or holding in camera hearings. Self-incrimination is not at issue in the present petition.[3/]

Thus, the only issue concerning execution of the financial affidavit is whether the trial judge unreasonably required a signature under the penalty of perjury. Both sides to this dispute cite Gordon v. State of Idaho, 778 F.2d 1397 (9th Cir. 1985)[4/] In Gordon, the trial court had dismissed a civil action because the plaintiff had refused to swear or affirm before testifying at his deposition. The Ninth Circuit reversed noting that when one's First Amendment rights run counter to governmental rules or policies, the government must use

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3. Although petitioner referenced a self-incrimination concern in the trial court, he did not exhaust the issue in his state habeas proceeding. This court has fully reviewed the papers filed with the California Supreme Court; the only issue raised with respect to appointed counsel is the issue concerning "swearing" to the accuracy of the form. This court cannot review an unexhausted issue that was not fairly presented to the California Supreme Court. Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986). This court offers no opinion on the outcome if the issue had been raised in the state habeas proceedings.

4. Respondents cited this case in the index of cases, but their brief is devoid of reference to the case. It appears that respondent's counsel did little more than copy the district attorney's brief in state court, and present it to this court. Moreover, respondents' general reliance on state cases in this federal habeas proceeding has been unhelpful.

the least restrictive means possible to accomplish its important policy in order for its rules to pass muster under a First Amendment analysis. The court held that a precise verbal formula was unnecessary to accomplish the purpose of impressing the witness with the need to tell the truth. However, not mentioned by petitioner, is the further holding of the court that an agreement by the plaintiff to testify under penalty of perjury with the knowledge that he could be prosecuted for perjury was appropriate. Gordon, 778 F.2d at 1401.

It is clear that the trial court only wanted the petitioner here to execute the financial declaration under penalty of perjury. The trial court suggested numerous ways for this to be accomplished. This colloquy occurred:

> Ms. Cummins-Monteleone [referring to the appointment of counsel for husband]: you will not give him counsel if he does not sign it under penalty of perjury?
>
> The Court: Right, because I can't verify that it is true.
>
> Ms. Cummins-Monteleone: You're saying that the only way you will give him counsel is for him to sign it under penalty of perjury?
>
> The Court: Right.
>
> Ms. Cummins-Monteleone: All right.
>
> The Court: That's the way it works. (Petitioner then went on stating that he wanted to sign it under duress).

RT September 20, 1989, 17:13-18.

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> The Court: Do you understand that you're signing that under penalty of perjury? For the record, do you understand that?
> Mr. Monteleone: That's an unsworn statement. That's not--
> The Court: We can swear you and make it formal. I mean, I want to satisfy you. (emphasis added).
> Mr. Monteleone: I refuse...
>
> ***
>
> The Court: Let me ask you this: Do you understand, by signing this, that you're signing it under penalty of perjury?
> Mr. Monteleone: No, I don't.
> The Court: You don't understand it?
> Mr. Monteleone: No, I don't.
> The Court: What is it you don't understand?
> Mr. Monteleone: I understand that's a sworn statement, and you can't force me to take an oath.

RT September 20, 1989, 20:15-21:8.

This colloquy clearly demonstrates that the trial court was attempting to utilize the least restrictive means possible to accomplish the purpose of having the document executed under penalty of perjury. The trial court was willing to call it anything that the petitioner wanted. However, both petitioner and his wife (who were conferring together during this colloquy as reflected in the record) were simply not willing to perform any task that might get them counsel and get the trial started. The

court again notes that petitioner herein signed his petition to this court under penalty of perjury without any problem being raised in this action.[5/] This fact coupled with a review of the record clearly shows that petitioner was not being deprived of any First Amendment right when he was asked to sign the form under penalty of perjury.[6/]

Moreover, this court notes the recent Supreme Court case of Employment Div. of Human Resources v. Smith, 110 S.Ct. 1595 (1990), which significantly lightened the burden to be borne by a state when its law becomes entangled with a person's professed religious beliefs. It may well be that Gordon is no longer the law. Nevertheless, it is not necessary to make that legal determination here because petitioner does not prevail even under the more stringent Gordon test.

III. THE FIRST AMENDMENT ISSUE

Much of the discussion regarding the trial court's refusal to appoint counsel is subsumed under this heading as well. Indeed, the First Amendment issue is only relevant insofar as it impacted the Sixth Amendment right to counsel, i.e., criminal trials are not reversed on procedural grounds for First Amendment violations per se. In any event, the court does not that petitioner's representation now that he offered all along to sign under

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5. On appeal, petitioner was represented by a court-appointed Deputy Public Defender. In order to obtain counsel, petitioner signed under penalty of perjury a similar financial declaration to the one he refused to sign prior to trial. See Appendix to Answer, Exhibit 7.

6. No discussion is necessary to find that, in our common law system, it is important that certain information or testimony be made to courts under penalty of perjury.

penalty of perjury is directly contradicted by the record. See, e.g., colloquy quoted above under Section C. It is clear from a review of the entire record that when petitioner refused to take an oath, he also refused to declare under penalty of perjury. RT September 20, 12:12-23:23. For the reasons stated above, this claim does not have any merit.

III. THE VICINAGE ISSUE

Petitioner is correct in asserting that the vicinage provision of the Sixth Amendment is important, Johnston v. United States, 351 U.S. 215 (1956), but he is mistaken with respect to its application. The Constitution only demands that the criminal trial be held at the "state and district" where the crime was committed; it does not purport to define the locale of the commission of various crimes.[7] It is perfectly within the rights of a state or the federal government to define the place of the commission of a crime -- even to define it in such a way that it can be committed in more than one place. See, e.g., United States v. Anderson, 328 U.S. 699 (1946). Petitioner presumes that the place of commission (or omission) for failure to file a tax return is Sacramento, California, merely because returns are ultimately processed there.

It is clear that California law allows for the prosecution of failure to file tax offenses in the county of

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7. Respondent attempts to raise an issue that the Sixth Amendment vicinage provisions do not apply to state crimes. Respondent claims "many cases" establish this fact. However, respondent does not cite to a single case. This court does not consider a matter at issue and subject to resolution by the court unless the party raising the issue makes some attempt to city authority.

residence. Cal. Rev. and Taxation Code § 19407. This venue provision is in complete agreement with vicinage decisions that hold the place where an act is to be performed is the proper vicinage for the prosecution of a crime. Johnston v. United States, supra. In United States v. Hoover, 139 F.Supp. 895 (W.D. Pa. 1955), affirmed 233 F.2d 870 (3rd Cir. 1956) an act of tax evasion was properly tried where the return was "signed and tendered," and not where the return was "filed" with appropriate state agency.

In the present case, the only logical place for the failure to file a tax return is the locale where the return would have been prepared and tendered but for the criminal act of failing to tender it. Petitioner would assert that everyone fails to file a tax return must travel to Sacramento for a criminal trial with resultant great disruption in their personal lives, and at some considerable expense. Petitioner's contention would produce an absurd result. It completely lacks merit here.

IV. NO CONSTITUTIONAL ERROR OCCURRED IN PETITIONER'S ARRAIGNMENT

The trial court summed up the type of case involving petitioner, and its simple issue:

> The Court: ...[T]he allegation doesn't require expertise, just filing a return. That's the issue. Pretty simple. There's no tax expertise needed in filing a return...

RT August 24, 1989 2:15-27.

Petitioner's feigned ignorance of the charges against him is frivolous. The misdemeanor complaint filed against petitioner (Appendix to Answer, Exhibit 1) notifies him of the statutory section violated, the date of violation, and a

short, but informative description of the crime. The court told him at his first appearance that he was being prosecuted for failing to file tax returns. RT April 6, 1989. He had written letters prior to any formal charge attempting to convince the tax authorities that he was not obligated to file a tax return. See e.g., documents in Exhibit 6 (Appendix to Answer).

This is not a case about a person who chose to plead guilty, but was not advised of all his rights, including the nature of the crime and the penalties involved. This is a case where a not guilty plea was entered on behalf of petitioner; he went to trial and was convicted. "The Sixth Amendment guarantees a criminal defendant a fundamental right 'to be informed of the nature and the cause of the accusation'" [citation omitted]. By including the elements of the offense, [a charging document] informs the defendant of the charges against him [citation omitted]." Lincoln v. Sunn, 807 F.2d 805 (9th Cir. 1987). While state statutes or court rules may require more than the constitutional minimum, the essence of the Sixth Amendment right to be given notice of the charges requires only that a defendant have the opportunity to prepare a defense to the charges on their merits. Obviously, such was the case here.

V. CONCLUSION

The court recommends that the petition for habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty days after being served with these findings and recommendations, any party may file written

objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Greenhow v. Secretary of Health and Human Services, 863 F.2d 633 (9th Cir. 1988).

DATED: August 30, 1991

UNITED STATES MAGISTRATE JUDGE

APPENDIX C

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SOLANO

APPELLATE DEPARTMENT

* * * *

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

vs.

ANTHONY S. MONTELEONE,

Defendant/Appellant.

NO. FC28087

OPINION ON APPEAL

[Filed 8/20/90]

This is an appeal from a conviction of violations of Revenue and Taxation Code Section 19406 and 19401(a) after a jury trial in the Northern Solano Municipal Court. Oral argument came on regularly before the appellate department on July 25, 1990. Defendant/Appellant ANTHONY S. MONTELEONE appeared with Deputy Public Defender MARK ROELKE; Deputy District Attorney RENE WILCZYNSKI appeared for the People of the State of California, Plaintiff/Respondent herein.

Appellant claims four grounds on appeal:

1) The trial court abused its discretion in denying appellant a continuance for his counsel to be

present;

2) Solano County was the improper venue for the trial of the case;

3) Appellant was not properly arraigned; and

4) Abuse of sentencing discretion by the trial court.

A review of the record in this case shows that the trial court granted multiple continuances to the appellant to obtain counsel for trial but, despite the multiple continuances and passage of months of time, counsel was not forthcoming. The appellant attempted to abuse the judicial system and was not successful. The record does not reveal any error of law and the conviction is supported by the facts in the record. The appellant was sentenced within the statutory authority of the law. The trial judge gave the appellant the opportunity to mitigate his punishment, but he failed to do so. There is no abuse shown.

The judgment of the trial court is affirmed.

DATED: August 20, 1990.

JAMES F. MOELK,
PRESIDING JUDGE
APPELLATE DEPARTMENT

WE CONCUR:

DENNIS BUNTING, JUDGE

MICHAEL L. McINNIS, JUDGE

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SOLANO

APPELLATE DEPARTMENT

* * * *

THE PEOPLE OF THE STATE OF CALIFORNIA,	NO. FC28088
Plaintiff/Respondent,	OPINION ON APPEAL
vs.	
MARY ANN CUMMINS-MONTELEONE,	[Filed 8/20/90]
Defendant/Appellant.	

This is an appeal from a conviction of violations of Revenue and Taxation Code Section 19406 and 19401(a) after a jury trial in the Northern Solano Municipal Court. Oral argument came on regularly before the appellate department on July 25, 1990. Defendant/Appellant MARY ANN CUMMINS-MONTELEONE appeared with Deputy Public Defender MARK ROELKE; Deputy District Attorney RENE WILCZYNSKI appeared for the People of the State of California, Plaintiff/Respondent herein.

Appellant claims four grounds on appeal:

1) The trial court abused its discretion in denying appellant a continuance for his counsel to be present;

2) Solano County was the improper venue for the trial of the case;

3) Appellant was not properly arraigned; and

4) Abuse of sentencing discretion by the trial court.

A review of the record in this case shows that the trial court granted multiple continuances to the appellant to obtain counsel for trial but, despite the multiple continuances and passage of months of time, counsel was not forthcoming. The appellant attempted to abuse the judicial system and was not successful. The record does not reveal any error of law and the conviction is supported by the facts in the record. The appellant was sentenced within the statutory authority of the law. The trial judge gave the appellant the opportunity to mitigate her punishment, but she failed to do so. There is no abuse shown.

The judgment of the trial court is affirmed.

DATED: August 20, 1990.

JAMES F. MOELK,
PRESIDING JUDGE
APPELLATE DEPARTMENT

WE CONCUR:

DENNIS BUNTING, JUDGE

APPENDIX D

Defendant: Monteleone, Anthony
Docket # F84281-CR

6-15-93	LMV JW	Def. present w/out counsel. DA Driscoll. Def. indicates this matter has been calendared w/the Supreme Court.
B. CORDY, CSR		Statements made by Def. and the Court. Court orders CTS to satisfy fine as Def. spent one year in custody. Matter off calendar.
7-15-93	JW	Upon review of docket, no action was taken regarding the Restitution Fee of $1,456.76. Per Judge Villarreal, defendant is still responsible for the Restitution. Give Defendant until 6-15-94 to pay $1,456.76 to the Court; and notify defendant.
7-15-93	JW	Memo sent to defendant reflecting above; copy in file.
7-16-93	EW	A/R updated.

F84281CR K071693-01-0030
34 1456.76 a/r 1456.76

Defendant: Cummins-Monteleone, Mary Ann
Docket # F84282-CR

6-15-93 LMV JW Def. present w/out counsel. DA Driscoll.

B. CORDY, CSR Def. indicates that this matter has been calendared w/the Supreme Court.

Statements made by def. and the court. Court orders CTS to satisfy fine as def. spent one year in custody. Matter off calendar.

7-15-93 JW Upon review of docket, no action was taken regarding the Restitution Fee of $1,456.76. Per Judge Villarreal, defendant is still responsible for the Restitution Fee. Give Defendant until 6-15-94 to pay $1,456.76 to the Court; and notify defendant. Memo sent to defendant reflecting above. Copy in file.

F84282CR K071693-01-0019
34 1456.76 a/r 1456.76

Memo

From the Chambers of Judge Luis M. Villarreal

Date: 7-15-93

Re: CUMMINS-MONTELEONE, MARY ANN
Case No. F84282CR

Upon review of docket, no action was taken concerning the Restitution Fee owed to the Court in the amount of $1,456.76.

You did receive credit for time served against the $60,000 fine; however, you are still obligated to pay the Restitution Fee of $1,456.76, which will be due to the Court by; 6-15-94.

Memo

From the Chambers of Judge Luis M. Villarreal

Date: 7-15-94 [sic]

Re: MONTELEONE, ANTHONY S.
Case No. F84281

Upon review of docket, no action was taken concerning the Restitution Fee owed to the Court in the amount of $1,456.76.

You did receive credit for time served against the $60,000 fine; however, you are still obligated to pay the Restitution Fee of $1,456.76, which will be due to the Court by 6-15-94.

APPENDIX E

CALIFORNIA REVENUE AND TAXATION CODE § 19401

"Any person who does any of the following is liable for a penalty of not more than five thousand dollars ($5,000):

(a) With or without intent to evade any requirement of this part or any lawful requirement of the Franchise Tax Board under this part, fails to file any return or to supply any information required under this part, or who, with or without such intent, makes, renders, signs, or verifies any false or fraudulent return or statement, or supplies any false or fraudulent information.

(b) Aids, abets, advises, encourages, or counsels any individual to evade the tax imposed by this part by not filing any return or supplying any information required under this part, or, by making, rendering, signing, or verifying any false or fraudulent return or statement, or by supplying false or fraudulent information.

(c) Under this part, is required to pay any estimated tax or tax, who willfully fails to pay that estimated tax or tax, at the time or times required by law or regulations.

The penalty shall be recovered in the name of the people in any court of competent jurisdiction. Counsel for the Franchise Tax Board may, upon request of the district attorney or other prosecuting attorney, assist the prosecuting attorney in presenting the law or facts to recover the penalty at the trial of a criminal proceeding for violation of this section.

The person is also guilty of a misdemeanor and shall upon conviction be fined not to exceed five thousand dollars ($5,000) or be imprisoned not to exceed one year, or both, at the discretion of the court, together with costs of investigation and prosecution."

CALIFORNIA REVENUE AND TAXATION CODE
§ 19406

"Any person who, within the time required by or under the provisions of this part, willfully fails to file any return or to supply anyinformation with intent to evade any tax imposed by this part, or who, willfully and with like intent, makes, renders, signs, or verifies any false or fraudulent return or statement or supplies any false or fraudulent information, is punishable by imprisonment in the county jail not to exceed one year, or in the state prison, or by fine of not more than twenty thousand dollars ($20,000), or by both such fine and imprisonment, at the discretion of the court."

APPENDIX F

EXECUTIVE AND AGENCY ORDERS

United States Office of Government Ethics, *Standards of Ethical Conduct For Employees of the Executive Branch*, Part I, Executive Order 12674 (effective April 12, 1989) and 5 C.F.R. Part 2635, published at 57 Fed.Reg. 35006-35067 (Aug. 7, 1992):

Subpart A-General Provisions of *Basic Obligations of Public Service*, § 2635.101(b)(12) and § 2635.809 provide in part:

"Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as Federal, State, or local taxes that are imposed by law."

Department of Transportation Federal Aviation Administration's *Conduct and Discipline* manual, Chapter 3.

Chapter 3, § 300 provides in part:

FAA employees "must conduct themselves while off duty in a manner that will not cause the public to question their reliability and trustworthiness in carrying out their responsibilities as employees of the Federal Government."

Chapter 3, §305 (a) provides in part:

"All employees are expected to discharge their private financial obligations and to maintain a reputation in the community for honoring debts. Failure without sufficient excuse or reason to honor valid debts, including claims based on court judgments and tax delinquencies, or to make and adhere to reasonable arrangements for settlement, will constitute grounds for disciplinary action."